2006

# The State of Utah v. Jacob A. Webb : Brief of Appellant

Utah Court of Appeals


J. Frederic Voros Jr.; Attorney for Plaintiff.
A.W. Lauritzen; Attorney for Defendant.

IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>JACOB A. WEBB,<br><br>Defendant/Appellant. | BRIEF OF APPELLANT<br><br>Priority No. 2<br><br>Case Number 20061109 |

**BRIEF OF APPELLANT**

Appeal from an Order of the Honorable Clint S. Judkins
Judge of the First Judicial District Court
Rich County, State of Utah

A.W. Lauritzen (1906)
15 East 600 North, #1
P.O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391
Attorney for Defendant/Appellant

J. Frederic Voros Jr., Attorney General, State of Utah
160 East 300 South 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801)366-0180
Attorney for Plaintiff/Appellee

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P.O. Box 140854
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## JURISDICTIONAL STATEMENT

Defendant entered a conditional plea to an Amended Information on the 25th day of July, 2006 (See Tr. #7 pg. 6). Judgement and sentence was orally imposed and executed by the Trial Court on the 24th day of October, 2006 and the Commitment, Judgment and Order of Restitution was signed and filed by the Court on the 29th day of November, 2006 (See Appendix A). A Notice of Appeal was filed by the Defendant on the 21st day of November, 2006, with an Amended Notice of Appeal being filed by the Defendant on the 15th day of December, 2006 (See Appendix B.) The Appeal is from a criminal Judgment pursuant to the provisions of Rule 26 of the Utah Rules of Criminal Procedure and Utah Code Ann. § 77-18a-1, (1953 as Amended.) Jurisdiction of this

Court is pursuant to the provisions of Utah Code Ann. § 78-2a-3(e).

## STATEMENT OF ISSUES & STANDARD OF REVIEW

**I. Whether a Trailer is, pursuant to Utah Law, classified as a motor Vehicle or as a Vehicle or is it variously classified as both.**

**II. When the same criminal conduct may be punished in two separate ways, is Defendant entitled to, upon Motion, endure conviction and/or punishment only with respect to the charge imposing the lesser sanction?**

**III. While the Defendant might be convicted of either crime, whether Defendant was entitled, as a matter of due process, to be punished as if he violated a Statute punishable as a Class A Misdemeanor.**

1. The standard of review on Appeal is that Defendant's challenge to the Trial Court's interpretation as to applicability of the punishment prescribed by Utah Code Ann. § 76-6-202 is a question of Statutory interpretation which is reviewed for correctness without deference to the Trial Court State vs. Hansen 63 P.3d 650 (Utah 2002). The Defendant's challenge to the Trial Court's factual findings will not be disturbed on Appeal unless they are clearly erroneous. State v Peterson, 810 P.2d 421, 425 (Utah 1991.) (Appendix C).

2. This issue was adequately preserved by Motions to Dismiss (Appendix D) and Objections on basis of the evidence presented during the Preliminary Hearing (Tr. #4 pg. 12) pursuant to the provisions of Rule 20 of the Utah Rules of Criminal Procedure and by invocation of the Doctrine involving Conditional Pleas (Tr. #7 pg 2). State vs. Sery 758 P.2d 935 (1988.) (Appendix E).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. § 13-14-102(14)(a) (1953 as Amended)

Utah Code Ann. § 13-14-102(15) (1953 as Amended)

Utah Code Ann. § 13-14-102(22) (1953 as Amended)

Utah Code Ann. § 13-14-102(18)(a) (1953 as Amended)

Utah Code Ann. § 41-3-102 (1953 as Amended)

Utah Code Ann. § 58-13a-1(16) [now repealed]

Utah Code Ann. § 58-33-2 [now repealed]

Utah Code Ann. § 76-1-106 (1953 as Amended)

Utah Code Ann. § 76-6-201 (1953 as Amended)

Utah Code Ann. § 76-6-202 (1953 as Amended)

Utah Code Ann. § 76-6-204 (1953 as Amended)

Utah Code Ann. § 76-6-404 (1953 as Amended)

Utah Code Ann. § 77-18a-1 (1953 as Amended)

Utah Code Ann. § 78-2a-3(e) (1953 as Amended)

United States Constitution, Due Process Clause

Untied States Constitution, 14th Amendment

Utah Constitution, Article I Section 12

## STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS:

3. This Appeal is from a final Judgment, Sentence and Order of Restitution imposed and orally entered in the First District Court for Rich County, State of Utah on the 24th day of October, 2006 and signed and filed on the 29th day of November, 2006 for the offense of Burglary of a Dwelling, a Second Degree Felony reduced to a Third Degree Felony of Burglary pursuant to a negotiated settlement between the parties reserving the right to Appeal designated issues.

## STATEMENT OF FACTS

4. The Defendant was charged in Case No. 051100067 on the 6th day of December, 2005 by Information with two counts of Criminal conduct, that being Burglary of a Dwelling in violation of Utah Code Ann. § 76-6-202 (1953 as Amended), a Second degree felony, said conduct having occurred on the 21st day of October, 2005 and Theft in violation of Utah Code Ann. § 76-6-404 (1953 as Amended), a Class A Misdemeanor, said conduct having also occurred on the 21st day of October, 2005, the Theft charge having been thereafter dismissed upon the Plea hereinabove noted. (Appendix F.)

5. A Conditional Plea pursuant to State vs. Sery (supra) was entered on the 25th day of July, 2006, whereupon the Defendant was ultimately convicted based on that Plea by the Court of Burglary in violation of Utah Code Ann. § 76-6-202. (Tr. #7 pg. 7.) (The Theft charge was dismissed as part of the Plea negotiation.)

6. The Trial Court orally imposed Judgment and Sentence on the 24th day of October, 2006 (Tr. #9 pg. 5,6, and 7), whereby the Defendant was sentenced to serve an indeterminate term of not to exceed five years in the Utah State Prison. The prison term was suspended and the Defendant was placed on probation, the terms of which included confinement for a term of 180 days in the Rich County Jail. The Defendant was sentenced upon a plea agreement the parties and thereby convicted for violation of a 3rd Degree Felony. Credit was granted for 49 days time served and Defendant was Ordered to pay a fine in the amount of $800.00 with a surcharge of $381.08 plus interest and is, even now, being supervised on probation.

7. Following a Preliminary Hearing ( Tr. #6 pg.1) the Defendant made a Motion that was filed requiring that the Bindover be Quashed alleging that as a consequence of applicable law, that Count 1 proceed, not as a charge of Burglary of a dwelling, a Second Degree Felony, but as a Class A Misdemeanor, Burglary of a motor vehicle which Motion was denied by the Trial Court on the 11th day of July, 2006. (Tr. #6 pg. 5)

## SUMMARY OF ARGUMENT

8. Whether Vehicle Burglary, a Class A Misdemeanor, under the facts of the instant case, literally and effectively proscribes the self same conduct as Burglary, a Second Degree Felony and it is thereby required that the Defendant be sentenced as a Class A Misdemeanant, the lesser of the two punishments specified for that conduct

pursuant to Utah Law.

## ARGUMENT

### I. Whether a Trailer is, pursuant to Utah Law, classified as a Motor Vehicle or as a Vehicle or is it variously classified as both.

9. The Officers narrative provided in discovery specifies that the Burglary was of a **trailer**. In describing the event, as " a trailer burglary", "both trailer...", "the gold trailer...", "a trailer "up Pole Canyon", " Pole Canyon trailer." The nature of the Burglarized enclosure was established, in reviewing the definitions of , **Motor Vehicle**", we find the following:

10. The Utah DMV, in specifying Vehicles to be Registered, the requirement is extended to:

> " All cars, snowmobiles, trailers over 750 lbs., motorcycles, boats, trucks, campers and off highway vehicles used in the state of Utah must be registered. Trailers weighing 750 lbs. or less when empty do not have to be registered. However, any trailer may be registered for your convenience." [emphasis mine]
> (See Appendix G).

11. In U.C.A. Section 13-14-102 (14)(a) " **Motor vehicle**" is defined as:

> (i) a travel trailer;
> (ii) a motor vehicle as defined in Section 41-3-102; as follows:
> (19)(a) " Motor Vehicle" means a vehicle intended primarily for use and operation on the highway that is:
> (i) self-propelled; or
> (ii) a trailer, travel trailer, or semitrailer.
> (iv) a trailer as defined in Section 41-1a-102; " [emphasis mine]

12. In U.C.A. Section 13-14-102 (18) " Recreational Vehicle" is defined as: "a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is either self-propelled or pulled by another vehicle."

(b) "Recreation vehicle: includes:
(i) a travel trailer;
(ii) a camping trailer; [emphasis mine].

13. In U.C.A. Section 13-14-102 (22) the description refers to a "Travel trailer," "camping trailer," or " fifth wheel trailer" as meaning, a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use that does not require a special highway movement permit when drawn by a self-propelled motor vehicle. [emphasis mine].

14. In U.C.A. Section 13-14-102 (15) the description defines a :
" New motor vehicle" as meaning, a motor vehicle that has never been titled or registered and ..... unless the motor vehicle is a trailer, travel trailer, or semitrailer, ..." [emphasis mine].

15. All of these definitions variously define a Motor Vehicle interchangeably as a Vehicle and as a trailer or camp trailer and further: in this case, the official report describes the burglarized units as "trailers". (See Appendix H).

16. Based on the testimony elicited in the course of the Preliminary Hearing held on the 25th day of April, 2006 (Tr. #4 pg. 4-17) and upon the discovery provided to

counsel the burglarized units are defined under Utah Law as vehicles (Tr. #4 pg. 13.)

17. Interestingly, it might be impossible for the putative burglar to determine whether he was committing a Felony or a Misdemeanor until all of the elements of the crime had been satisfied by the initial unlawful entry with the requisite intent which situation also raises due process concerns. In addition to the Constitutional concept that persons similarly situated are entitled to like application of the laws, it is also mandated that all persons who desire to obey the law are entitled to notice as to how they may conduct themselves in conformity therewith. State vs. Musser 118 UT 537, 232 P.2d 193 (1950). (Appendix I).

**II. When the same criminal conduct may be punished in two separate ways is**
**Defendant entitled to, upon Motion, endure conviction and/or punishment only with respect to the charge imposing the lesser sanction.**

18. The charge against the Defendant in Count 1 of the Information #66 as Amended (Appendix J) reads as follows:

> "BURGLARY , a third degree felony, as follows .. the defendant entered or remained unlawfully in a building or any portion of a building with intent to commit:
> (a) a felony; (b) theft;"

19. U.C.A. 76-6-201. provides, in pertinent fact:

> (1) " Building," in addition to its ordinary meaning, means any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein and includes:
> (a) Each separately secured or occupied portion of the structure or vehicle;

and
(b) Each structure appurtenant to or connected with the structure or vehicle.
(2) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

20. A case of interest in Utah, while unreported, is the Utah Court of Appeals opinion in State v. Cates 2000 UT APP 256 # 990402CA (See Appendix K). Cates appealed a conviction of burglary of a dwelling, a second degree felony, which burglary apparently involved a trailer which had some provision for human habitation. The court of appeals dealing with the issue presented in that Appeal ruled that a trailer could be, under Utah Law a "building and dwelling" in light of the fact that the trailer relevant to that case was equipped for overnight accommodation and held that the second degree Burglary conviction was supportable. The issue Defendant presses here was not addressed in the Cate ruling and was not, apparently; presented during that appeal or at the trial court level.

21. The issue addressed here is whether Vehicle Burglary, a class A Misdemeanor, under the facts of the instant case, literally and effectively proscribes the self same conduct as that which might support a charge of Burglary, a Second Degree Felony and it is thereby required that the Defendant be sentenced as a Class A Misdemeanant, the lesser of the two punishments specified for Defendant's unlawful conduct under Utah Law.

22. The Defendant would invoke the doctrine which was formulated in State vs. Shondel at 22 Utah 2d 343, 453 P.2d 146 (1969) (Appendix L) which doctrine

supports Defendants contention and thereby requiring that when two different statutory provisions define the same offense, a defendant may avail himself (or herself) of the provision imposing the lesser penalty. See also State v. Green 995 P.2d 1250, 2000. Ut. Case # 990281- CA. (Appendix M) The Shondel case is particularly applicable in that it involved two Statutes enacted with respect to the same classification of crimes (*ie* possession of the same drug) and which Statutes were more or less enacted contemporaneously and focused on subject matter which had two definitions which might be employed interchangeably.

23. In support of Defendant's position that this doctrine applies let us compare the charges one to the other:

UCA 76-6-202, Burglary, " ....the defendant entered or remained unlawfully in a building or any portion of a building with intent to commit: (a) a felony; (b) theft; and

UCA 76-6-204, Vehicle Burglary, " ... the defendant unlawfully entered any vehicle with intent to commit a felony or theft.

24. These two offenses specified definitions within the Utah Code which mirror each other. Compare Utah Codes 41-3-102. 13-14-102 wherein the definitions of a trailer suitable for habitation provide that it is. in fact. a Motor Vehicle or Vehicle. In light of the facts of the instant case no amount of reflection can operate to distinguish the elements of the two specified crimes as other than identical and the statutes thus proscribe the same conduct and by conviction of a miscreant of either crime,

the conviction of the other must automatically occur.

25. The well-established rule is that a statute creating a crime should be sufficiently certain in order that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concomitant of that rule is that a penal statute must be sufficiently clear, specific and understandable as to the penalty imposed for its violation. The esoteric question which might logically be suggested, that being "whether, in contemplating a misdeed, a miscreant really weighs such matters?" must be left for another day.

26. Where there is doubt or uncertainty as to which of two possible punishments is applicable to an offense. the Shondel doctrine mandates that an accused is entitled to any benefit provided by the less onerous. That opinion held that the statutes of the State of Utah should be "construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote Justice." This holding in Shondel at pg. 3 was compelled by reference to the language of U.C.A. 76-1-106 1953.

27. In the Shondel case. the Defendant was charged and convicted of violation of U.C.A. 58-13a-1(16) [now repealed] (See Shondel (supra)) but could have, on the s same facts, been convicted of violation of U.C.A. 58-33-2 [now repealed] (See Shondel (supra)). Due to the uncertainty created by an overlapping of the statutes the same

situation that we see in the instant case arose.[1] Because there was doubt as to which of the two punishments was applicable to the offense, the Utah Court held that the accused was entitled to the benefit of the lesser and in light thereof the Court remanded the case for proceedings to correct the sentence imposed.

### III. While the Defendant might be convicted of either crime, whether Defendant was entitled, as a matter of due process, to be punished as if he violated a Statute punishable as a Class A Misdemeanor.

28. One interpretation of the cases espoused by Defendant would suggest that the holdings only apply as a limitation on sentencing and it might be maintained that although the bindover was proper and that Defendant might then be required to answer to the felony charge at any trial but if the verdict was adverse, Defendant was nevertheless entitled to relief at the time that the sentence was imposed.

29. Defendant urges that the Trial Court should have Ordered that the bindover be quashed and that proceedings thereafter should have been upon misdemeanor charges and again refers to the fundamental fairness requirements imposed on the Prosecution by Utah Law UCA 76-1-2 (Supra).

30. Defendant also notes that, as a practical matter, to proceed under a felony charge superimposes upon any case certain impediments to a just and speedy disposition. The Court might consider the civil disabilities that accompany a felony indictment as well as impediments to the plea negotiation process and compromise of Court resources and

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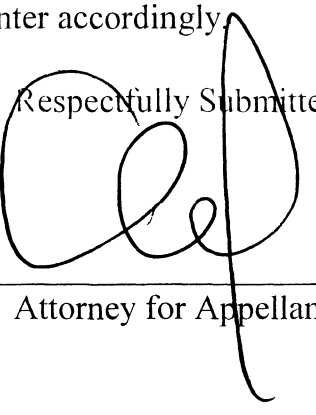
[1] Apparently the drug involved in Shondels case was subject to definitions found in each statute but punishment prescribed in one statute varied from and was less than the penalty imposed by the other.

judicial economy. These points suggest that a prosecution proceed on Misdemeanor informations as opposed to achieving the same result being governed by restriction at sentencing.

## CONCLUSION

On the facts of this case the Defendant might have been interchangeably charged and convicted of either Burglary or Vehicle Burglary, pursuant to two different but equally valid provisions of the criminal law, and Defendant should therefore be entitled to the benefit of the lesser punishment, regardless of which crime Defendant ultimately stands convicted and the record of conviction enter accordingly.

Respectfully Submitted,



Attorney for Appellant

## CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the foregoing, BRIEF OF APPELLANT, postage prepaid, to the following listed below on the 4th 8th day of May, 2007.

Elaine Ricks
Meghan Johnson

J. Frederic Voros Jr.
Assistant Attorney General, State of Utah
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

**ADDENDUM**
**(None required)**

# UTAH RULE OF CRIMINAL PROCEDURE

## Rule 20. Conditional Pleas

County, 1998, 973 P.2d 927, 353 Utah Adv. Rep. 24. Mandamus ⇐ 74(1)

Normal abuse of discretion standard for reviewing actions of public officials in extraordinary writ proceeding in nature of mandamus afforded county commission little latitude in conforming to requirements of statute governing ballot titles for initiatives to change form of county government, where statute imposed objective standard requiring that ballot title be accurate, and did not allow consideration of whether commission attempted to be fair and impartial. U.C.A.1953, 17–35a–204(3); Rules App.Proc., Rule 19; Rules Civ.Proc., Rule 65B. Walker v. Weber County, 1998, 973 P.2d 927, 353 Utah Adv. Rep. 24. Mandamus ⇐ 74(1)

Firm which had sought to exchange property with Board of State Lands and Forestry for purpose of developing it lacked standing to seek mandamus to challenge Board's subsequent decision to lease the property due to existence of potential plaintiffs with a more direct interest where firm specifically conceded that challenge was not based on failure to accept the proposal, but on procedures used. Const. Art. 5; U.C.A. 1953, 65–1–68; Rules Civ.Proc., Rule 65B(b)(3); Rules App.Proc., Rule 19. Terracor v. Utah Bd. of State Lands & Forestry, 1986, 716 P.2d 796. Mandamus ⇐ 23(1)

**2.5. Bankruptcy**

Utah Supreme Court's denial of motion filed by Chapter 13 debtor for extraordinary writ to compel district court to allow her to intervene in litigation involving her sister was not void, having been entered postpetition while automatic stay was in effect; order was entered not in connection with any claim against debtor, but on debtor's own motion for relief in nature of extraordinary writ, and did not result in any judgment, fine, or other penalty against debtor. In re Lundahl, 2003, 307 B.R. 233. Bankruptcy ⇐ 2395

**2.75. Dismissal of petition**

Dismissal of petitioners' petition for extraordinary relief was warranted, where the petitioners failed to demonstrate that the city council acted in bad faith when it repealed an ordinance that petitioners were attempting to challenge with a referendum, and then enacted four new ordinances pertaining to the development of the same tracts of land covered by the previous ordinance. Carpenter v. Riverton City, 2004, 103 P.3d 127, 506 Utah Adv. Rep. 40, 2004 UT 68. Courts ⇐ 209(2)

**3. Review**

Standard of review, in proceeding for extraordinary writ to direct district court judge to reinstate trial de novo of a justice court conviction, was limited to whether judge regularly exercised his authority in dismissing appeal from justice court. U.C.A.1953, 78–5–120; Rules Civ.Proc., Rule 65B; Rules App.Proc., Rule 19. Dean v. Henriod, 1999, 975 P.2d 946, 364 Utah Adv. Rep. 11, 1999 UT App 50. Criminal Law ⇐ 260.11(1)

## RULE 20. HABEAS CORPUS PROCEEDINGS

**(a) Application for an Original Writ; When Appropriate.** If a petition for a writ of habeas corpus is filed in the appellate court or submitted to a justice or judge thereof, it will be referred to the appropriate district court unless it is shown on the face of the petition to the satisfaction of the appellate court that the district court is unavailable or other exigent circumstances exist. If a petition is initially filed in a district court or is referred to a district court by the appellate court and the district court denies or dismisses the petition, a refiling of the petition with the appellate court is inappropriate; the proper procedure in such an instance is an appeal from the order of the district court.

**(b) Procedure on Original Petition.**

(1) A habeas corpus proceeding may be commenced by filing a petition with the clerk of the appellate court or, in emergency situations, with a justice or judge of the court. An original petition and seven copies shall be filed in the Supreme Court. An original petition and four copies shall be filed in the Court of Appeals. The petitioner shall serve a copy of the petition on the respondent pursuant to any of the methods provided for service of process in Rule 4 of the Utah Rules of Civil Procedure but, if imprisoned, the petitioner may mail by United States mail, postage prepaid, a copy of the petition to the Attorney

General of Utah or the county attorney of the county if imprisoned in a county jail. Such service is in lieu of service upon the named respondent, and a certificate of mailing under oath that a copy was mailed to the Attorney General or county attorney must be filed with the clerk of the appellate court. In emergency situations, an order to show cause may be issued by the court, or a single justice or judge if the court is not available, and a stay or injunction may be issued to preserve the court's jurisdiction until such time as the court can hear argument on whether a writ should issue.

(2) If the petition is not referred to the district court, the attorney general or the county attorney, as the case may be, shall answer the petition or otherwise plead within ten days after service of a copy of the petition. When a responsive pleading or motion is filed or an order to show cause is issued, the court shall set the case for hearing and the clerk shall give notice to the parties.

(3) The clerk of the appellate court shall, if the petitioner is imprisoned or is a person otherwise in the custody of the state or any political subdivision thereof, give notice of the time for the filing of memoranda and for oral argument, to the attorney general, the county attorney, or the city attorney, depending on where the petitioner is held and whether the petitioner is detained pursuant to state, county or city law. Similar notice shall be given to any other person or an association detaining the petitioner not in custody of the state.

**(c) Contents of Petition and Attachments.** The petition shall include the following:

(1) A statement of where the petitioner is detained, by whom the petitioner is detained, and the reason, if known, why the respondent has detained the petitioner.

(2) A brief statement of the reasons why the detention is deemed unlawful. The petition shall state in plain and concise language:

(A) the facts giving rise to each claim that the confinement or detention is in violation of a state order or judgment or a constitutional right established by the United States Constitution or the Constitution of the State of Utah or is otherwise illegal;

(B) whether an appeal was taken from the judgment or conviction pursuant to which a petitioner is incarcerated; and

(C) whether the allegations of illegality were raised in the appeal and decided by the appellate court.

(3) A statement indicating whether any other petition for a writ of habeas corpus based on the same or similar grounds has been filed and the reason why relief was denied.

(4) Copies of the court order or legal process, court opinions and findings pursuant to which the petitioner is detained or confined, affidavits, copies of orders, and other supporting written documents shall be attached to the petition or it shall be stated by petitioner why the same are not attached.

**(d) Contents of Answer.** The answer shall concisely set forth specific admissions, denials, or affirmative defenses to the allegations of the petition and shall state plainly and unequivocally whether the respondent has, or at any time has had, the person designated in the petition under control and restraint and, if so, the cause for the restraint. The answer shall not contain citations of legal authority or legal argument.

**(e) Other Provisions.**

(1) If the respondent cannot be found or if the respondent does not have the person in custody, the writ and any other process issued may be served upon anyone having the petitioner in custody, in the manner and with the same effect as if that person had been made respondent in the action.

(2) If the respondent refuses or avoids service, or attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the respondent or other person so resisting, for presentation, together with the person designated in the writ, forthwith before the court.

(3) At the time of the issuance of the writ, the court may, if it appears that the person detained will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts and directing the sheriff to bring the detained person before the court to be dealt with according to law.

(4) The respondent shall appear at the proper time and place with the person designated or show good cause for not doing so. If the person designated has been transferred, the respondent must state when and to whom the transfer was made, and the reason and authority for the transfer. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or of the respondent, if enough is stated to show the meaning and intent.

(5) The person restrained may waive any rights to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter, the court may place such person in the custody of an individual or association as may be deemed proper.

**Advisory Committee Note**

The amendments make clear that an original writ for habeas corpus should be filed only in the District Court. An application to an appellate court must demonstrate on the face of the petition the unavailability of the District Court. Petitions that do not contain such documentation will be summarily referred to the District Court. The clarification seeks to halt the practice by some pro se petitioners of simultaneously filing the same petition in different courts.

The amendments simplify the procedures for service of petitions upon the respondent by incarcerated petitioners. The former rule required service by summons on the respondent. The amendments allow service on the Attorney General or county attorney by mail.

**Library References**

Courts ⇐209(2).
Habeas Corpus ⇐661, 664 to 686.

Westlaw Key Number Searches: 106k209(2); 197k661; 197k664 to 197k686.

# UTAH RULES OF CRIMINAL PROCEDURE

## Rule 26. Appeals

Notes of Decisions

In general 1

1. In general

Where appeal from writ of habeas corpus issued by federal district judge presented an important and serious question regarding administering of sentencing procedures with respect to control of federal court over federal probationers who are also wanted for state charges, matter required appointment of special attorney to represent United States and the United States District Court for the District of Utah amicus curiae. U.S. v. Merriman, 1959, 172 F.Supp. 765, vacated 267 F.2d 378, certiorari denied 80 S.Ct. 97, 361 U.S. 844, 4 L.Ed.2d 83. Amicus Curiae ⇦ 1

## RULE 26. FILING AND SERVICE OF BRIEFS

**(a) Time for Serving and Filing Briefs.** Briefs shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13. If a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel is filed after the Rule 13 briefing notice is sent, service and filing of appellant's brief shall be within 30 days from the denial of such motion. The appellee, or in cases involving a cross-appeal, the appellee/cross appellant, shall serve and file a brief within 30 days after service of the appellant's brief. In cases involving cross-appeals, the appellant shall serve and file the second brief described in Rule 24(g) within 30 days after service of the appellee/cross-appellant's brief. A reply brief may be served and filed by the appellant or the appellee/cross-appellant in cases involving cross-appeals. If a reply brief is filed, it shall be served and filed within 30 days after the filing and service of the appellee's brief or the appellant's second brief in cases involving cross-appeals. If oral argument is scheduled fewer than 35 days after the filing of appellee's brief, the reply brief must be filed at least 5 days prior to oral argument. By stipulation filed with the court in accordance with Rule 21(a), the parties may extend each of such periods for no more than 30 days. A motion for enlargement of time need not accompany the stipulation. No such stipulation shall be effective unless it is filed prior to the expiration of the period sought to be extended.

**(b) Number of Copies to Be Filed and Served.** For matters pending in the Supreme Court, ten copies of each brief, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court. For matters pending in the Court of Appeals, eight copies of each brief, one of which shall contain an original signature, shall be filed with the Clerk of the Court of Appeals. Two copies shall be served on counsel for each party separately represented.

**(c) Consequence of Failure to File Briefs.** If an appellant fails to file a brief within the time provided in this rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal. If appellee fails to file a brief within the time provided by this rule, or within such time as may be extended by order of the appellate court, an appellant may move that the appellee not be heard at oral argument.

**(d) Return of Record to the Clerk.** Each party, upon the filing of shall return the record to the clerk of the court having custody pur these rules.

[Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April November 1, 1998.]

### Cross References

Briefs, checklist, see Rules App. Proc., Form 8.

### Library References

Appeal and Error ⇐764, 765, 769.
Criminal Law ⇐1130(4).
Westlaw Key Number Searches: 30k764; 30k765; 30k769; 110k1130(4).

C.J.S. Appeal and Error §§ 621, 624 to
C.J.S. Criminal Law § 1688.

### Notes of Decisions

**Failure to file brief 2**
**Informal practice 1**

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**1. Informal practice**

Informal practice of "lodging" of appellate briefs, under which brief was submitted in incomplete form, formally filed when completed, and filing date was date brief was "lodged," is no longer permitted in Court of Appeals. Hausknect v. Industrial Com'n, 1994, 882 P.2d 683, certiorari granted 892 P.2d 13, certiorari dismissed as improvidently granted 938 P.2d 248. Appeal And Error ⇐ 765

**2. Failure to file brief**

Where court granted request of public defender to be relieved of further participation in defendant's appeal, after he had reviewed record and found no error on which reversal could reasonably be expected, and court then informed defendant that he could file his own brief within 30 days, appeal would be dismissed at expiration of such period without filing of brief. State v. Montez, 1966, 17 Utah 2d 299, 410 P.2d 764. Criminal Law ⇐ 1130(4)

Where defendant who was convicted of an offense was represented by public defender, defendant filed notice of appeal and after reading record public defender informed defendant that there was no error in record and a copy of such letter was sent to the Supreme Court whereupon defendant was advised of public defender's decision and notified that if defendant desired to file a brief he could do so within 30 days, no brief was filed after expiration of such time appeal would be dismissed. State v. Hutchinson, 1965, 17 Utah 2d 242, 408 P.2d 711. Criminal Law ⇐ 1130(4)

Appeal of defendant who claimed that he had been coerced into pleading guilty was denied, where counsel appointed by court to represent defendant on appeal examined record and reported to court that they found no evidence of coercion and no error which presented reasonable prospect for reversal, and court advised defendant that he could proceed in his own behalf and allowed him 30 days in which to file a brief, and that time had expired without a brief having been filed. State v. Alexander, 1964, 16 Utah 2d 166, 397 P.2d 299. Criminal Law ⇐ 1130(4)

Failure of defendant to file brief in his own behalf within period allowed after he was notified that court-appointed attorney had reported inability to find error in record upon which attorney could hope to obtain reversal of conviction necessitated dismissal of appeal. State v. Haynes, 1964, 15 Utah 2d 408, 393 P.2d 799. Criminal Law ⇐ 1130(4)

Supreme Court on appeal from judgment of conviction will, in absence of brief by respondent, reverse judgment without construing law (Supreme Court Rule 10). Provo City v. Paramount Theater Co., 1930, 75 Utah 381, 285 P. 645. Criminal Law ⇐ 1130(4)

## RULE 27. FORM OF BRIEFS

**(a) Paper size; printing margins.** Briefs shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 1/2 inches wide and 11 inches long, and shall be securely bound along the left margin. Paper may be recycled paper, with or

# UTAH CRIMINAL CODE

## 13-14-102 (14)(a) (1953 as Amended)

(a) the manufacturer or distributor of the new motor vehicles;

(b) an intermediate distributor; and

(c) an agent, officer, or field or area representative of the franchisor.

(10) "Lead" means the referral by a franchisor to a franchisee of a potential customer whose contact information was obtained from a franchisor's program, process, or system designed to generate referrals for the purchase or lease of a new motor vehicle, or for service work related to the franchisor's vehicles.

(11) "Line-make" means the motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor, or manufacturer of the motor vehicle.

(12) "Mile" means 5,280 feet.

(13) "Motor home" means a self-propelled vehicle, primarily designed as a temporary dwelling for travel, recreational, or vacation use.

(14)(a) "Motor vehicle" means:

(i) a travel trailer;

(ii) a motor vehicle as defined in Section 41–3–102;

(iii) a semitrailer as defined in Section 41–1a–102;

(iv) a trailer as defined in Section 41–1a–102; and

(v) a recreational vehicle.

(b) "Motor vehicle" does not include a motorcycle as defined in Section 41–1a–102.

(15) "New motor vehicle" means a motor vehicle as defined in Subsection (14) that has never been titled or registered and has been driven less than 7,500 miles, unless the motor vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does not apply.

(16) "New motor vehicle dealer" is a person who is licensed under Subsection 41–3–202(1)(a) to sell new motor vehicles.

(17) "Notice" or "notify" includes both traditional written communications and all reliable forms of electronic communication unless expressly prohibited by statute or rule.

(18)(a) "Recreational vehicle" means a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is either self-propelled or pulled by another vehicle.

(b) "Recreational vehicle" includes:

(i) a travel trailer;

(ii) a camping trailer;

(iii) a motor home;

(iv) a fifth wheel trailer; and

(v) a van.

(19)(a) "Relevant market area," except with respect to recreational vehicles, means:

(i) the county in which a dealership is to be established or relocated; and

(ii) the area within a ten-mile radius from the site of the new or relocated dealership.

(b) "Relevant market area," with respect to recreational vehicles, means:

(i) the county in which the dealership is to be established or relocated; and

(ii) the area within a 35-mile radius from the site of the new or relocated dealership.

(20) "Sale, transfer, or assignment" means any disposition of a franchise or an interest in a franchise, with or without consideration, including a bequest, inheritance, gift, exchange, lease, or license.

(21) "Serve" or "served," unless expressly indicated otherwise by statute or rule, includes any reliable form of communication.

(22) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use, that does not require a special highway movement permit when drawn by a self-propelled motor vehicle.

# UTAH CRIMINAL CODE

## 13-14-102 (15)(1953 as Amended)

(a) the manufacturer or distributor of the new motor vehicles;

(b) an intermediate distributor; and

(c) an agent, officer, or field or area representative of the franchisor.

(10) "Lead" means the referral by a franchisor to a franchisee of a potential customer whose contact information was obtained from a franchisor's program, process, or system designed to generate referrals for the purchase or lease of a new motor vehicle, or for service work related to the franchisor's vehicles.

(11) "Line-make" means the motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor, or manufacturer of the motor vehicle.

(12) "Mile" means 5,280 feet.

(13) "Motor home" means a self-propelled vehicle, primarily designed as a temporary dwelling for travel, recreational, or vacation use.

(14)(a) "Motor vehicle" means:

(i) a travel trailer;

(ii) a motor vehicle as defined in Section 41–3–102;

(iii) a semitrailer as defined in Section 41–1a–102;

(iv) a trailer as defined in Section 41–1a–102; and

(v) a recreational vehicle.

(b) "Motor vehicle" does not include a motorcycle as defined in Section 41–1a–102.

(15) "New motor vehicle" means a motor vehicle as defined in Subsection (14) that has never been titled or registered and has been driven less than 7,500 miles, unless the motor vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does not apply.

(16) "New motor vehicle dealer" is a person who is licensed under Subsection 41–3–202(1)(a) to sell new motor vehicles.

(17) "Notice" or "notify" includes both traditional written communications and all reliable forms of electronic communication unless expressly prohibited by statute or rule.

(18)(a) "Recreational vehicle" means a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is either self-propelled or pulled by another vehicle.

(b) "Recreational vehicle" includes:

(i) a travel trailer;

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(iii) a motor home;

(iv) a fifth wheel trailer; and

(v) a van.

(19)(a) "Relevant market area," except with respect to recreational vehicles, means:

(i) the county in which a dealership is to be established or relocated; and

(ii) the area within a ten-mile radius from the site of the new or relocated dealership.

(b) "Relevant market area," with respect to recreational vehicles, means:

(i) the county in which the dealership is to be established or relocated; and

(ii) the area within a 35-mile radius from the site of the new or relocated dealership.

(20) "Sale, transfer, or assignment" means any disposition of a franchise or an interest in a franchise, with or without consideration, including a bequest, inheritance, gift, exchange, lease, or license.

(21) "Serve" or "served," unless expressly indicated otherwise by statute or rule, includes any reliable form of communication.

(22) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use that does not require a special highway movement permit when drawn by a self-propelled motor vehicle.

**UTAH CRIMINAL CODE**

**13-14-102 (18)(a) (1953 as Amended)**

(a) the manufacturer or distributor of the new motor vehicles;

(b) an intermediate distributor; and

(c) an agent, officer, or field or area representative of the franchisor.

(10) "Lead" means the referral by a franchisor to a franchisee of a potential cu whose contact information was obtained from a franchisor's program, process, or designed to generate referrals for the purchase or lease of a new motor vehicle, or for work related to the franchisor's vehicles.

(11) "Line-make" means the motor vehicles that are offered for sale, lease, or distrib under a common name, trademark, service mark, or brand name of the franchis manufacturer of the motor vehicle.

(12) "Mile" means 5,280 feet.

(13) "Motor home" means a self-propelled vehicle, primarily designed as a temp dwelling for travel, recreational, or vacation use.

(14)(a) "Motor vehicle" means:

(i) a travel trailer;

(ii) a motor vehicle as defined in Section 41–3–102;

(iii) a semitrailer as defined in Section 41–1a–102;

(iv) a trailer as defined in Section 41–1a–102; and

(v) a recreational vehicle.

(b) "Motor vehicle" does not include a motorcycle as defined in Section 41–1a–102.

(15) "New motor vehicle" means a motor vehicle as defined in Subsection (14) that never been titled or registered and has been driven less than 7,500 miles, unless the mot vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does apply.

(16) "New motor vehicle dealer" is a person who is licensed under Subs 41–3–202(1)(a) to sell new motor vehicles.

(17) "Notice" or "notify" includes both traditional written communications and all rel forms of electronic communication unless expressly prohibited by statute or rule.

(18)(a) "Recreational vehicle" means a vehicular unit other than a mobile home, prim designed as a temporary dwelling for travel, recreational, or vacation use, that is eith propelled or pulled by another vehicle.

(b) "Recreational vehicle" includes:

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(v) a van.

(19)(a) "Relevant market area," except with respect to recreational vehicles, means:

(i) the county in which a dealership is to be established or relocated; and

(ii) the area within a ten-mile radius from the site of the new or relocated dealers

(b) "Relevant market area," with respect to recreational vehicles, means:

(i) the county in which the dealership is to be established or relocated; and

(ii) the area within a 35-mile radius from the site of the new or relocated dealers

(20) "Sale, transfer, or assignment" means any disposition of a franchise or an interest franchise, with or without consideration, including a bequest, inheritance, gift, exchan lease, or license.

(21) "Serve" or "served," unless expressly indicated otherwise by statute or rule, incl any reliable form of communication.

(22) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehi without motive power, designed as a temporary dwelling for travel, recreational, or vacat use that does not require a special highway movement permit when drawn by a self-propel motor vehicle.

# UTAH CRIMINAL CODE

## 13-14-102 (22) (1953 as Amended)

(a) the manufacturer or distributor of the new motor vehicles;

(b) an intermediate distributor; and

(c) an agent, officer, or field or area representative of the franchisor.

(10) "Lead" means the referral by a franchisor to a franchisee of a potential customer whose contact information was obtained from a franchisor's program, process, or system designed to generate referrals for the purchase or lease of a new motor vehicle, or for service work related to the franchisor's vehicles.

(11) "Line-make" means the motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor, or manufacturer of the motor vehicle.

(12) "Mile" means 5,280 feet.

(13) "Motor home" means a self-propelled vehicle, primarily designed as a temporary dwelling for travel, recreational, or vacation use.

(14)(a) "Motor vehicle" means:

(i) a travel trailer;

(ii) a motor vehicle as defined in Section 41–3–102;

(iii) a semitrailer as defined in Section 41–1a–102;

(iv) a trailer as defined in Section 41–1a–102; and

(v) a recreational vehicle.

(b) "Motor vehicle" does not include a motorcycle as defined in Section 41–1a–102.

(15) "New motor vehicle" means a motor vehicle as defined in Subsection (14) that has never been titled or registered and has been driven less than 7,500 miles, unless the motor vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does not apply.

(16) "New motor vehicle dealer" is a person who is licensed under Subsection 41–3–202(1)(a) to sell new motor vehicles.

(17) "Notice" or "notify" includes both traditional written communications and all reliable forms of electronic communication unless expressly prohibited by statute or rule.

(18)(a) "Recreational vehicle" means a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is either self-propelled or pulled by another vehicle.

(b) "Recreational vehicle" includes:

(i) a travel trailer;

(ii) a camping trailer;

(iii) a motor home;

(iv) a fifth wheel trailer; and

(v) a van.

(19)(a) "Relevant market area," except with respect to recreational vehicles, means:

(i) the county in which a dealership is to be established or relocated; and

(ii) the area within a ten-mile radius from the site of the new or relocated dealership.

(b) "Relevant market area," with respect to recreational vehicles, means:

(i) the county in which the dealership is to be established or relocated; and

(ii) the area within a 35-mile radius from the site of the new or relocated dealership.

(20) "Sale, transfer, or assignment" means any disposition of a franchise or an interest in a franchise, with or without consideration, including a bequest, inheritance, gift, exchange, lease, or license.

(21) "Serve" or "served," unless expressly indicated otherwise by statute or rule, includes any reliable form of communication.

(22) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use, that does not require a special highway movement permit when drawn by a self-propelled motor vehicle.

# UTAH CRIMINAL CODE

## 41-3-102 (1953 as Amended)

**§§ 41-3-35, 41-3-36. Renumbered as §§ 41-3-506, 41-3-507 by Laws 1992, c. 234, §§ 48, 49**

**§ 41-3-37. Renumbered as § 41-3-508 by Laws 1992, c. 234, § 50**

**§ 41-3-38. Renumbered as § 41-3-305 by Laws 1992, c. 234, § 37**

**§ 41-3-39. Renumbered as § 41-3-405 by Laws 1992, c. 234, § 42**

## PART 1. ADMINISTRATION

### United States Code Annotated

Motor vehicles, disclosure labels, see 15 U.S.C.A. § 1231 et seq.

### § 41-3-101. Short title

This chapter is known as the Motor Vehicle Business Regulation Act.

Laws 1992, c. 234, § 12.

#### Cross References

Interest rates, see § 59-1-402.
Low speed vehicle considered vehicle, see § 41-6-117.6.
New Automobile Franchise Act, see § 13-14-101 et seq.
New automobiles, sale or transfer of ownership, see § 13-14-202.
Termination or noncontinuance of franchise, see § 13-14-301.

### § 41-3-102. Definitions

As used in this chapter:

(1) "Administrator" means the motor vehicle enforcement administrator.

(2) "Agent" means a person other than a holder of any dealer's or salesperson's license issued under this chapter, who for salary, commission, or compensation of any kind, negotiates in any way for the sale, purchase, order, or exchange of three or more motor vehicles for any other person in any 12-month period.

(3) "Auction" means a dealer engaged in the business of auctioning motor vehicles, either owned or consigned, to the general public.

(4) "Board" means the advisory board created in Section 41-3-106.

(5) "Body shop" means a business engaged in rebuilding, restoring, repairing, or painting primarily the body of motor vehicles damaged by collision or natural disaster.

(6) "Commission" means the State Tax Commission.

(7) "Crusher" means a person who crushes or shreds motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, to reduce the useable materials and metals to a more compact size for recycling.

(8)(a) "Dealer" means a person:

(i) whose business in whole or in part involves selling new, used, or and used motor vehicles or off-highway vehicles; and

(ii) who sells, displays for sale, or offers for sale or exchange three more new or used motor vehicles or off-highway vehicles in any 12-month period.

(b) "Dealer" includes a representative or consignee of any dealer.

(9)(a) "Dismantler" means a person engaged in the business of dismantling motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, for the resale of parts or for salvage.

(b) "Dismantler" includes a person who dismantles three or more motor vehicles in any 12-month period.

(10) "Distributor" means a person who has a franchise from a manufacturer of motor vehicles to distribute motor vehicles within this state and who in whole or in part sells or distributes new motor vehicles to dealers or who maintains distributor representatives.

(11) "Distributor branch" means a branch office similarly maintained by a distributor for the same purposes a factory branch is maintained.

(12) "Distributor representative" means a person and each officer and ployee of the person engaged as a representative of a distributor or distribu branch of motor vehicles to make or promote the sale of the distributor o distributor branch's motor vehicles, or for supervising or contacting dealer prospective dealers of the distributor or the distributor branch.

(13) "Division" means the Motor Vehicle Enforcement Division crea Section 41-3-104.

(14) "Factory branch" means a branch office maintained by a person manufactures or assembles motor vehicles for sale to distributors, mo vehicle dealers, or who directs or supervises the factory branch's represen tives.

(15) "Factory representative" means a person and each officer and empl of the person engaged as a representative of a manufacturer of motor vehi or by a factory branch to make or promote the sale of the manufacturer factory branch's motor vehicles, or for supervising or contacting the dealers prospective dealers of the manufacturer or the factory branch.

(16) "Franchise" means a contract or agreement between a dealer and manufacturer of new motor vehicles or its distributor or factory branch which the dealer is authorized to sell any specified make or makes of motor vehicles.

(17) "Manufacturer" means a person engaged in the business of constructing or assembling new motor vehicles, ownership of which is customarily transferred by a manufacturer's statement or certificate of origin, or a person who constructs three or more new motor vehicles in any 12-month period.

(18) "Motorcycle" has the same meaning as defined in Section 41-1a-10

(19)(a) "Motor vehicle" means a vehicle intended primarily for use and operation on the highway that is:

(i) self-propelled; or

(ii) a trailer, travel trailer, or semitrailer.

(b) "Motor vehicle" does not include:

(i) mobile homes as defined in Section 41-1a-102;

(ii) trailers of 750 pounds or less unladen weight; and

(iii) farm tractors and other machines and tools used in the production, harvesting, and care of farm products.

(20) "New motor vehicle" means a motor vehicle that has never been titled or registered and has been driven less than 7,500 miles, unless the motor vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does not apply.

(21) "Off-highway vehicle" has the same meaning as provided in Section 41-22-2.

(22) "Pawnbroker" means a person whose business is to lend money on security of personal property deposited with him.

(23) "Principal place of business" means a site or location in this state:

(a) devoted exclusively to the business for which the dealer, manufacturer, remanufacturer, transporter, dismantler, crusher, or body shop is licensed, and businesses incidental to them;

(b) sufficiently bounded by fence, chain, posts, or otherwise marked to definitely indicate the boundary and to admit a definite description with space adequate to permit the display of three or more new, or new and used, or used motor vehicles; and

(c) that includes a permanent enclosed building or structure large enough to accommodate the office of the establishment and to provide a safe place to keep the books and other records of the business, at which the principal portion of the business is conducted and the books and records kept and maintained.

(24) "Remanufacturer" means a person who reconstructs used motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, to change the body style and appearance of the motor vehicle or who constructs or assembles motor vehicles from used or new and used motor vehicle parts, or who reconstructs, constructs, or assembles three or more motor vehicles in any 12-month period.

(25) "Salesperson" means an individual who for a salary, commission, or compensation of any kind, is employed either directly, indirectly, regularly, or occasionally by any new motor vehicle dealer or used motor vehicle dealer to sell, purchase, or exchange or to negotiate for the sale, purchase, or exchange of motor vehicles.

(26) "Semitrailer" has the same meaning as defined in Section 41-1a-102.

(27) "Small trailer" means a trailer that has an unladen weight of mo 750 pounds, but less than 2,000 pounds.

(28) "Special equipment" includes a truck mounted crane, cherry p material lift, post hole digger, and a utility or service body.

(29) "Special equipment dealer" means a new or new and used mo vehicle dealer engaged in the business of buying new incomplete motor vehic with a gross vehicle weight of 12,000 or more pounds and installing spec equipment on the incomplete motor vehicle.

(30) "Trailer" has the same meaning as defined in Section 41-1a-102.

(31) "Transporter" means a person engaged in the business of transporti motor vehicles as described in Section 41-3-202.

(32) "Travel trailer" has the same meaning as provided in Sec 41-1a-102.

(33) "Used motor vehicle" means a vehicle that has been titled and re tered to a purchaser other than a dealer or has been driven 7,500 or mo miles, unless the vehicle is a trailer, or semitrailer, in which case the mile limit does not apply.

(34) "Wholesale motor vehicle auction" means a dealer primarily engage the business of auctioning consigned motor vehicles to dealers or dismant who are licensed by this or any other jurisdiction.

Laws 1949, c. 67, § 2; Laws 1961, c. 80, § 6; Laws 1965, c. 81, § 1; Laws 1965 § 2; Laws 1981, c. 182, § 4; Laws 1987, c. 171, § 2; Laws 1990, c. 192, § 1991, c. 153, § 2; Laws 1992, c. 1, § 179; Laws 1992, c. 234, § 13; Laws 199 § 1, eff. May 1, 1995; Laws 1998, c. 165, § 1, eff. May 4, 1998; Laws 1998, c. 33 eff. May 4, 1998; Laws 2003, c. 157, § 1, eff. May 5, 2003.

**Codifications** C 1943, Supp., § 57-6-12; C 1953, § 41-3-7.

### Library References

Licenses ⇐16(0.5).
Westlaw Key Number Search: 238k16(0.5).
C.J.S. Licenses §§ 30 to 34.

### Notes of Decisions

**Dealer 1**

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**1. Dealer**

Where seller and another independent used automobile dealer occupied same business premises and, at request of seller, who was unable to finance sale, other dealer procured necessary loan from finance company by signing his own name on title retention contract as "seller-dealer", but neither buyer of such automobile nor seller expected other dealer to assume responsibility of acquiring title bile for buyer, second dealer was not or "vendor" within statutes outlinin such person, and could not, therefore of violation of such statutes, be held buyer, or precluded from recovering er's bond, for losses suffered when dealer failed to use proceeds of sale acquire title to automobile for buy 1943, 57-6-4, 57-6-5, 57-6-7. Bates 1952, 121 Utah 165, 239 P.2d 74 26

# UTAH CRIMINAL CODE

## 76-3-201 (1953 as Amended)

## § 76–3–105. Infractions

(1) Infractions are not classified.

(2) Any offense which is an infraction within this code is expressly designated and any offense defined outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

Laws 1973, c. 196, § 76–3–105.

### Library References

Criminal Law ⇐28
Westlaw Key Number Search 110k28.
C J S Criminal Law § 9.

### United States Code Annotated

Petty offense defined federal crimes and offenses, see 18 U S C A § 19

## PART 2. SENTENCING

## § 76–3–201. Definitions—Sentences or combination of sentences allowed—Civil penalties—Hearing

(1) As used in this section:

(a) "Conviction" includes a:

(i) judgment of guilt; and

(ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e)(i) "Victim" means any person who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal or disqualification from public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment;

(e) on or after April 27, 1992, to life in prison without parole; or

(f) to death.

(3)(a) This chapter does not deprive a court of authority conferred by law to:

(i) forfeit property;

(ii) dissolve a corporation;

(iii) suspend or cancel a license;

(iv) permit removal of a person from office;

(v) cite for contempt; or

(vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4)(a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(5)(a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

(i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;

(ii) charged with a felony or a class A, B, or C misdemeanor; and

(iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c)(i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) $75 for up to 100 miles a defendant is transported;

(B) $125 for 100 up to 200 miles a defendant is transported; and

(C) $250 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(6)(a) In addition to any other sentence the court may impose, the court shall order the defendant to pay court-ordered restitution to the county for the cost of incarceration in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii)(A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13c-301 if the defendant is a state prisoner housed in a county correctional facility as a condition of probation under Subsection 77-18-1(8).

(b)(i) The costs of incarceration under Subsection (6)(a) are:

(A) the daily core inmate incarceration costs and medical and transportation costs established under Section 64-13c-302; and

(B) the costs of transportation services and medical care that exceed the negotiated reimbursement rate established under Subsection 64-13c-302(2).

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining the monetary sum and other conditions for the court-ordered restitution under this Subsection (6), the court shall consider the criteria provided under Subsections 77-38a-302(5)(c)(i) through (iv).

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

(7)(a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the

court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76–3–404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

(8) If during the commission of a crime described as child kidnapping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the highest minimum term in state prison. This Subsection (8) takes precedence over any conflicting provision of law.

Laws 1973, c 196, § 76–3–201, Laws 1979, c. 69, § 1, Laws 1981, c 59, § 1, Laws 1983, c 85, § 1, Laws 1983, c 88, § 3, Laws 1984, c 18, § 1, Laws 1986, c 156, § 1, Laws 1987, c 107, § 1, Laws 1990, c 81, § 1, Laws 1992, c 142, § 1, Laws 1993, c 17, § 1, Laws 1994, c 13, § 19, Laws 1995, c 111, § 1, eff May 1, 1995, Laws 1995, c 117, § 1, eff May 1, 1995, Laws 1995, c 301, § 1, eff May 1, 1995, Laws 1995, c 337, § 1, eff May 1, 1995, Laws 1995, 1st Sp Sess , c 10, § 1, eff April 29, 1996, Laws 1996, c 40, § 1, eff April 29, 1996, Laws 1996, c 79, § 98, eff April 29, 1996, Laws 1996, c 241, §§ 2, 3, eff April 29, 1996, Laws 1998, c 149, § 1, eff May 4, 1998, Laws 1999, c 270, § 15, eff May 3, 1999, Laws 2001, c 209, § 1, eff April 30, 2001, Laws 2002, c 35, § 4, eff May 6, 2002, Laws 2003, c 280, § 1, eff May 5, 2003

**Historical and Statutory Notes**

Laws 2002 c 35, substantially rewrote this section that formerly provided

"(1) As used in this section

"(a) 'Conviction' includes a

"(i) judgment of guilt, and

"(ii) plea of guilty

"(b) 'Criminal activities' means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct

"(c) 'Pecuniary damages' means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses

(d) Restitution' means full partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c)

'(e)(i) 'Victim means any person who the court determines has suffered pecuniary damages as a result of the defendant s criminal activities

(ii) 'Victim' does not include any coparticipant in the defendant's criminal activities

"(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them

' (a) to pay a fine,

# UTAH CRIMINAL CODE

## 76-1-106 (1953 as Amended)

which section defines the word "prisoner," does not set forth the crime of aggravated assault; although reference to such section was an obvious statutory error, in that reference should have been to section 76-5-102, the court was not empowered to reform the statutory language. U.C.A.1953, 76-1-105, 76-5-101, 76-5-103(1), (2)(a), 77-39-4(1). State v. Archuletta, 1974, 526 P.2d 911. Assault And Battery ⇐ 54; Constitutional Law ⇐ 70.1(10)

**3. Controlled substances**

Provision of the Controlled Substances Act allowing the Attorney General to add or delete substances from the lists of controlled substances conflicts with provision of the criminal code abolishing common-law crimes and providing that no conduct is a crime unless made so by the criminal code or by other applicable statute or ordinance. U.C.A.1953, 58-37-3(2), 76-1-105. State v. Gallion, 1977, 572 P.2d 683. Controlled Substances ⇐ 6

## § 76-1-106. Strict construction rule not applicable

The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104.

Laws 1973, c. 196, § 76-1-106.

### Cross References

Construction of statutes, rules of equity prevail, see § 68-3-2.

### Library References

Sentencing and Punishment ⇐12
Statutes ⇐241.
Westlaw Key Number Searches: 350Hk12; 361k241.

C.J.S. Criminal Law §§ 1461, 1760
C.J.S. Statutes §§ 376, 378 to 379.

### Research References

**Treatises and Practice Aids**

1 Substantive Criminal Law § 2.2, Interpretation of Criminal Statutes.

Wharton's Criminal Law § 12, Interpretation of Statutes.

### Notes of Decisions



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**1. In general**

Penal statute should be construed according to fair import of its terms to promote justice. U.C.A.1953, 76-1-106. State v. Horton, 1993, 848 P.2d 708, certiorari denied 857 P.2d 948. Statutes ⇐ 241(1)

**2. Instructions**

Where jury, after deliberating in excess of [illegible] hours, requested clarification of "extreme [illegible] or emotional disturbance" in manslaughter instruction, court's statement that [illegible] be given the meaning jurors would give [illegible] common every day use and defining "extreme," "mental," and "emotional" as [illegible]ionary did not cause confusion or prejudice defendant on theory that the phrase "extreme mental or emotional disturbance" is a term of art which derives its meaning from usage and not from the individual words and that the definitions served no useful purpose and obfuscated the meaning of the term. U.C.A.1953, 76-1-106, 76-5-205, 76-5-205(1)(b), 77-42-1. State v. Gaxiola, 1976, 550 P.2d 1298. Criminal Law ⇐ 863(2)

**3. Sentencing**

Statute limiting consecutive sentences restricts actual time served to no more than 30 years but does not preclude imposition of consecutive sentences totaling more than 30 years. U.C.A.1953, 76-1-106, 76-3-401, 76-3-401(4). State v. Horton, 1993, 848 P.2d 708, certiorari denied 857 P.2d 948. Sentencing And Punishment ⇐ 545

# UTAH CRIMINAL CODE

## 76-6-202 (1953 as Amended)

### Research References

**Treatises and Practice Aids**

1 Criminal Law Defenses § 110, Property Intrusion and Destruction Offenses-Miscellaneous Defenses.

3 Substantive Criminal Law § 21.2, Criminal Trespass.

Wharton's Criminal Law § 319, With Consent.

Wharton's Criminal Law § 322, Entry by Defendant's Person.

Wharton's Criminal Law § 323, Entry by Instrument.

Wharton's Criminal Law § 325, In General.

Wharton's Criminal Law § 331, In General.

### Notes of Decisions



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**1. Building**

Defendant unlawfully entered two separate buildings, under U.C.A.1953, 76-6-201, defining "building," for purposes of burglary, where laundry room and apartment were separately secured portions of apartment building and defendant unlawfully entered both of them. State v. Porter, 1985, 705 P.2d 1174. Burglary ⇦ 4

**2. Dwelling**

Cabin lived in by owner two or three days a week was a "dwelling" for purposes of conviction of burglary in the second degree. U.C.A 1953, 76-6-201, 76-6-202, 76-6-202(2). State v. Cox, 1992, 826 P.2d 656. Burglary ⇦ 4

"Usually occupied" within statute defining "dwelling" for purposes of burglary statute refers to purpose for which structure is used, and if structure is one in which people typically stay overnight, it fits within definition of "dwelling." U.C.A.1953, 76-6-201, 76-6-202, 76-6-202(2). State v. Cox, 1992, 826 P.2d 656. Burglary ⇦ 6

**3. Entry**

Simple passage by any part of body over door's threshold can amount to "entry" of residence required for offense of aggravated burglary. U.C.A.1953, 76-6-201(4), 76-6-203. State v Peterson, 1994, 881 P.2d 965, certiorari denied 890 P.2d 1034. Burglary ⇦ 9(2)

Kick to open door which had initially been opened by resident was sufficient to establish "entry" for purposes of offense of aggravated burglary. U.C.A.1953, 76-6-201(4), 76-6-203. State v. Peterson, 1994, 881 P.2d 965, certiorari denied 890 P.2d 1034. Burglary ⇦ 9(2)

## § 76-6-202. Burglary

(1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:

(a) a felony;

(b) theft;

(c) an assault on any person;

(d) lewdness, a violation of Subsection 76-9-702(1);

(e) sexual battery, a violation of Subsection 76-9-702(3);

(f) lewdness involving a child, in violation of Section 76-9-702.5; or

(g) voyeurism against a child under Subsection 76-9-702.7(2) or (5).

Burglary is a felony of the third degree unless it was committed in a [illegible] in which event it is a felony of the second degree.

[illegible]violation of this section is a separate offense from any of the offenses [illegible] Subsections (1)(a) through (g), and which may be committed by the [illegible] he is in the building.

[illegible]96, § 76-6-202; Laws 2001, c. 359, § 1, eff. April 30, 2001; Laws 2001, [illegible]4, § 2, eff. July 5, 2001; Laws 2003, c. 325, § 1, eff. May 5, 2003.

# UTAH CRIMINAL CODE

## 76-6-204 (1953 as Amended)

Evidence as to defendant's manner of entry into apartment by picking lock, lateness of the hour, defendant's explanation to police officers that they had him and what could he say, and totality of surrounding circumstances supported aggravated burglary conviction. U.C.A.1953, 76-6-203. State v. Porter, 1985, 705 P.2d 1174. Burglary ⇐ 41(1)

Evidence, both direct and circumstantial, admitted of no reasonable hypothesis other than that of guilt to warrant conviction of aggravated burglary. U.C.A.1953, 76-6-203(1)(c). State v. Isaacson, 1985, 704 P.2d 555. Burglary ⇐ 41(1)

Evidence, which established that victim suffered physical pain as result of defendant's attack, established the requisite "physical injury" required in order to support conviction for aggravated burglary. U.C.A. 1953, 76-6-203(1)(a). State v. Peterson, 1984, 681 P.2d 1210. Burglary ⇐ 41(1)

Testimony of accomplices, corroborated by other evidence produced at trial, was sufficient to sustain convictions for aggravated robbery, aggravated burglary and theft, though homeowners who were robbed could not testify that they were entirely certain that defendant was one of the men who robbed them. U.C.A.1953, 76-6-203, 76-6-302, 76-6-404. State v. McCullar, 1983, 674 P.2d 117. Criminal Law ⇐ 511.1(6.1); Criminal Law ⇐ 511.1(9)

In prosecution for aggravated burglary, evidence was sufficient to sustain conviction, in view of evidence indicating that defendant struck apartment manager in the face, thereby stunning manager, that defendant threatened to kill manager if manager did not stay away, and that, at time defendant was fleeing scene of burglary, defendant was armed with knife which had blade four or five inches long. U.C.A.1953, 76-6-203. State v. Young, 1977, 559 P.2d 541. Burglary ⇐ 41(1)

**10. Sentencing**

Trial court did not abuse its discretion in imposing consecutive sentences for defendant's convictions of felony murder, aggravated burglary, and aggravated kidnapping, and in imposing maximum sentence under dangerous weapon enhancement statute; defendant was the mastermind behind scheme to burglarize house, he carried gun into house and fired it, he had a criminal history, and he showed a lack of remorse for crimes he committed. U.C.A.1953, 76-3-203(1), 76-3-401(4), 76-5-203, 76-5-302, 76-6-203. State v. Pierson, 2000, 12 P.3d 103, 405 Utah Adv. Rep. 53, 2000 UT App 274, certiorari denied 20 P.3d 403. Sentencing And Punishment ⇐ 80; Sentencing And Punishment ⇐ 570

**11. Judgment**

Oral judgment convicting defendant of aggravated burglary, a third-degree felony, was properly corrected in subsequent written judgment to be aggravated burglary, first-degree felony; aggravated burglary as a third-degree felony was legal impossibility under Utah law, defendant was charged with "aggravated burglary," a first-degree felony, and jury found him guilty of aggravated burglary. U.C.A.1953, 76-6-203; U.C.A.1953, 77-35-22(e) (Repealed). Parry v. State, 1992, 837 P.2d 998. Criminal Law ⇐ 996(1)

**12. Review**

Court of Appeals lacked jurisdiction over appeal from judgment and conviction of aggravated burglary, a first-degree felony, and accordingly lacked jurisdiction to certify appeal to the Supreme Court. U.C.A.1953, 76-6-203(2), 78-2-2(3)(i). State v. Garcia, 1991, 805 P.2d 199. Criminal Law ⇐ 1019

Defendant who was charged and convicted of aggravated burglary but whose motion to enter judgment of conviction for next lower category of offense was granted by court resulting in him being convicted of attempted aggravated battery and sentenced to statutory penalty for attempted aggravated burglary was not entitled on appeal to attack constitutionality of punishment for aggravated burglary. U.C.A.1953, 76-3-203(1, 2), 76-3-402(1), 76-4-102(2), 76-6-203(1)(c) State v. Harding, 1978, 576 P.2d 1284. Criminal Law ⇐ 1136

## § 76-6-204. Burglary of a vehicle—Charge of other offense

(1) Any person who unlawfully enters any vehicle with intent to commit a felony or theft is guilty of a burglary of a vehicle.

(2) Burglary of a vehicle is a class A misdemeanor.

(3) A charge against any person for a violation of Subsection (1) shall not preclude a charge for a commission of any other offense.

Laws 1973, c. 196, § 76-6-204.

# UTAH CRIMINAL CODE

## 76-6-404 (1953 as Amended)

## § 76–6–404. Theft—Elements

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Laws 1973, c. 196, § 76–6–404.

### Cross References

Motor vehicles, unauthorized control for extended time, see § 41–1a–1314.

### Library References

Larceny ⇐1 to 16.
Westlaw Key Number Searches: 234k1 to 234k16.

C.J.S. Larceny §§ 1(1) to 9, 13 to 50, 79.

### Research References

**ALR Library**

2002 A.L.R 5th 19, What is "Property of Another" Within Statute Proscribing Larceny, Theft, or Embezzlement of Property of Another

**Treatises and Practice Aids**

13 BNA Daily Tax Report H-7, 1987, Tax Shelters-Investment in Movie for Purchase of Print Held to be Sham: No Actual or Honest Profit Objective was Evident in 1981 Movie Investment Resulting in Backdating of Interest to 1980.

13 BNA Daily Report for Executives H-7, 1987, Tax Shelters-Investment in Movie for Purchase of Print Held to be Sham: No Actual or Honest Profit Objective was Evident in 1981 Movie Investment Resulting in Backdating of Interest to 1980.

6 BNA Daily Report for Executives H-15, 1987, Tax Shelters-Deductions Disallowed for Taxpayer's Investment in Motion Picture.

6 BNA Daily Tax Report H-15, 1987, Tax Shelters-Deductions Disallowed for Taxpayer's Investment in Motion Picture.

**Treatises and Practice Aids**

3 Substantive Criminal Law § 19.3, Larceny-Taking and Carrying Away.

Wharton's Criminal Law § 383, In General.

Wharton's Criminal Law § 408, In General.

### Notes of Decisions



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**1. In general**

Under the consolidated theft statute, there is only one offense of theft. U.C.A.1953, 76–6–403. State v. Bush, 2001, 47 P.3d 69, 412

# UTAH CRIMINAL CODE

## 77-18a-1 (1953 as Amended)

# CHAPTER 18a
# THE APPEAL

ection
7-18a-1. Appeals—When proper.
7-18a-2. Capital cases.

## § 77-18a-1. Appeals—When proper

(1) An appeal may be taken by the defendant from:

(a) the final judgment of conviction, whether by verdict or plea;

(b) an order made after judgment that affects the substantial rights of the defendant;

(c) an interlocutory order when upon petition for review the appellate court decides the appeal would be in the interest of justice; or

(d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(2) An appeal may be taken by the prosecution from:

(a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

(e) an order of the court granting a pretrial motion to suppress evidence when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;

(f) under circumstances not amounting to a final order under Subsection (a), a refusal to bind the defendant over for trial on a felony as charged or a pretrial order dismissing or quashing in part a felony information, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;

(g) an order of the court granting a motion to withdraw a plea of guilty or no contest;

(h) a finding pursuant to Title 77, Chapter 15a, Exemptions from Death Penalty in Capital Cases, that a capital defendant is exempt from a sentence of death, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice; or

(i) a finding pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that an inmate sentenced to death is incompetent to be executed.

...c. 7, § 10; Laws 1995, c. 65, § 1, eff. May 1, 1995, Laws 1997, c. 364, § 1, ...1997; Laws 2003, c. 11, § 10, eff. March 15, 2003; Laws 2004, c. 137, § 1, ...2004.

# CONSTITUTION OF THE UNITED STATES OF AMERICA

## Due Process Clause

## Amendment XIII. Slavery abolished; enforcement

**Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**Section 2.** Congress shall have power to enforce this article by appropriate legislation.

### Historical Notes

**Proposal and Ratification**

This amendment was proposed to the legislatures of the several States by the Thirty-eighth Congress, on January 31, 1865, and was declared, in a proclamation of the Secretary of State, dated December 18, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States. The States which ratified this amendment, and the dates of ratification, are: Illinois, Feb. 1, 1865; Rhode Island, Feb. 2, 1865; Michigan, Feb. 2, 1865; Maryland, Feb. 3, 1865; New York, Feb 3, 1865; Pennsylvania, Feb. 3, 1865; West Virginia, Feb. 3, 1865; Missouri, Feb. 6, 1865; Maine, Feb. 7, 1865; Kansas, Feb. 7, 1865; Massachusetts, Feb. 7, 1865; Virginia, Feb. 9, 1865; Ohio, Feb. 10, 1865; Indiana, Feb. 13, 1865; Nevada, Feb. 16, 1865; Louisiana, Feb. 17, 1865; Minnesota, Feb. 23, 1865; Wisconsin, Feb. 24, 1865; Vermont, Mar. 9, 1865; Tennessee, Apr. 7, 1865; Arkansas, Apr. 14, 1865; Connecticut, May 4, 1865; New Hampshire, July 1, 1865; South Carolina, Nov. 13, 1865; Alabama, Dec. 2, 1865; North Carolina, Dec. 4, 1865, and Georgia, Dec. 6, 1865.

The Legislatures of the following States ratified this amendment after Dec. 6, 1865; Oregon, Dec. 8, 1865; California, Dec. 19, 1865; Florida, Dec. 28, 1865 (Florida again ratified on June 9, 1868, upon its adoption of a new constitution); Iowa, Jan. 15, 1866; New Jersey, Jan. 23, 1866; Texas, Feb. 18, 1870, Delaware, Feb. 12, 1901; Kentucky, Mar. 18, 1976, and Mississippi, Mar. 16, 1995.

### Library References

Slaves ⇐24
Westlaw Topic No. 356.

C.J.S. Peonage §§ 3 to 5.
C.J.S. Slaves § 10.

### Research References

**ALR Library**

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 A.L.R.4th 1063.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination justifying relief in federal court, 4 A.L.R. Fed. 449.

## Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a

State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Historical Notes

**Proposal and Ratification**

This amendment was proposed to the legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of [illegible] House of the Thirty-ninth Congress: [illegible]ore, Resolved, That said fourteenth article [illegible]y declared to be a part of the Constitution of the United States, and it shall be duly [illegible]ated as such by the Secretary of State." [illegible]cretary of State accordingly issued a [illegible]tion, dated July 28, 1868, declaring [illegible]proposed fourteenth amendment had [illegible]ified by the legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 4, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequently ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, 1868, respectively.

The State of New Jersey expressed support for this amendment on Nov. 12, 1980.

## Cross References

Due process guarantee, see U.S.C.A. Const. Amend. V.

## Library References

Constitutional Law ⇐209 to 320.5.

States ⇐18.

United States ⇐7.1, 10, 79, 85.

Westlaw Topic Nos. 92, 360, 393.

C.J.S. Constitutional Law §§ 455, 462 to 464, 466 to 467, 470, 501, 503, 513, 518, 540, 557, 576 to 581, 585, 587, 596, 612, 614 to 618, 700 to 762, 764 to 773, 775 to 791, 793 to 984, 986 to 1065, 1067 to 1177, 1179 to 1208, 1210 to 1427.

C.J.S. Right to Die § 2.

C.J.S. States § 6.

C.J.S. United States §§ 9, 10, 12, 120, 123.

## Research References

**ALR Library**

Action of private institution of higher education as constituting state action, or action under color of law, for purposes of Fourteenth Amendment and 42 U.S.C.A. sec. 1983, 37 A.L.R. Fed. 601.

Civil actions removable from state court to federal court under 28 U.S.C.A. § 1443, 159 A.L.R. Fed. 377.

Constitutionality, construction, and application of statute relating to dental hygienists, 11 A.L.R.2d 724.

Constitutionality, construction, and application of statutory provisions respecting persons who may prepare tax returns for others, 10 A.L.R.2d 1443.

Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child, 14 A.L.R.4th 717.

Construction and application of sec. 902 of Civil Rights Act of 1964 (42 U.S.C.A. sec. 2000h–2) authorizing United States to intervene in private action for relief from denial of equal protection of laws under Fourteenth Amendment on account of race, color, religion, sex, or national origin, 19 A.L.R. Fed. 623.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 A.L.R.4th 1063.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Diluting effect of minorities' votes by adoption of particular election plan, or gerrymandering of election district, as violation of equal protection clause of Federal Constitution, 27 A.L.R. Fed. 29.

Effect of use, or alleged use, of internet on personal jurisdiction in, or venue of, federal court case, 155 A.L.R. Fed. 535.

Exclusion from municipality of industrial activities inconsistent with residential character, 9 A.L.R.2d 683.

Exclusion of women from employment involving risk of fetal injury as violative of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. secs. 2000e et seq.), 66 A.L.R. Fed. 968.

Garage as part of house with which it is physically connected within zoning regulations or restrictive covenant, 7 A.L.R.2d 593.

Inverse condemnation state court class actions, 49 A.L.R.4th 618.

Mandatory maternity leave rules or policies for public school teachers as constituting violation of equal protection clause of Fourteenth Amendment to Federal Constitution, 17 A.L.R. Fed. 768.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt, 30 A.L.R.4th 155.

Propriety of federal court's exclusion of public from criminal or civil trial in order to protect trade secrets, 69 A.L.R. Fed. 892.

Referendum relating to low-or moderate-income housing projects as constituting racial discrimination in violation of Federal Constitution, 15 A.L.R. Fed. 613.

Refusal to hire, or dismissal from employment, on account of plaintiff's sexual lifestyle or sexual preference as violation of

Federal Constitution or federal civil rights statutes, 42 A.L.R. Fed. 189.
Regulation of practice of photography, 7 A.L.R.2d 416.
Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion, 3 A.L.R.2d 466.
Requirement that court advise accused of, and make inquiry with respect to, waiver of right to testify, 72 A.L.R.5th 403.
Right of jailed or imprisoned parent to visit from minor child, 15 A.L.R.4th 1234.
Same-sex sexual harassment under state anti-discrimination laws, 73 A.L.R.5th 1.
"State-created danger," or similar theory, as basis for civil rights action under 42 U.S.C.A. § 1983, 159 A.L.R. Fed. 37.
Tenants' rights, under due process clause of Federal Constitution, to notice and hearing prior to imposition of higher rents or additional service charges for government-owned or government-subsidized housing, 28 A.L.R. Fed. 739.
Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking, 53 A.L.R.4th 801.
Validity and construction of regulations as to subdivision maps or plats, 11 A.L.R.2d 524.
Validity and construction of "right-to-work" laws, 92 A.L.R.2d 598.
Validity of building height regulations, 8 A.L.R.2d 963.
Validity of statute, ordinance, or regulation forbidding granting of exclusive rights or franchises to, or abolishing existing exclusive rights secured pursuant to outstanding permits for, taxicab or hack stands, 8 A.L.R.2d 574.
Validity of statutory classifications based on population-governmental employee salary or pension statutes, 96 A.L.R.3d 538.
Validity of statutory classifications based on population—jury selection statutes, 97 A.L.R.3d 434.
Validity of statutory classifications based on population—tax statutes, 98 A.L.R.3d 1083
Validity of statutory classifications based on population-zoning, building, and land use statutes, 98 A.L.R.3d 679.
What constitutes direct evidence of age discrimination in action under Age Discrimination in Employment Act (29 U.S.C.A. § 621 et seq.)—Post-Price Waterhouse cases, 155 A.L.R. Fed. 283.
What constitutes racial harassment in employment violative of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.), 156 A.L.R. Fed. 1.
What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes—Public employment cases, 153 A.L.R. Fed. 609.
What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes—Nonemployment cases, 152 A.L.R. Fed. 1.
What constitutes "an opportunity for full and fair litigation" in state court precluding habeas corpus review under 28 U.S.C.A. sec. 2254 in federal court of state prisoner's Fourth Amendment claims, 75 A.L.R. Fed. 9
What constitutes employment discrimination on basis of "marital status" for purposes of state civil rights laws, 44 A.L.R.4th 1044.
What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.
When is supervisor's hostile environment sexual harassment under Title VII of Civil Rights Act of 1964 (42 U.S.C.A § 2000e et seq.) imputable to employer, 157 A.L.R Fed. 1.
Zoning based on size of commercial or industrial enterprises or units, 7 A.L.R.2d 1007
Zoning: change in ownership of nonconforming business or use as affecting right to continuance thereof, 9 A.L.R 2d 1039.

**Encyclopedias**

16B Am. Jur. 2d, Constitutional Law § 745 et seq.

**Treatises and Practice Aids**

50 Am. Jur. Proof of Facts 3d 449, Disqualification of Trial Judge for Cause.
53 Am. Jur. Proof of Facts 3d 249, Proof of Defense of Entrapment by Estoppel.

## Amendment XV. Universal male suffrage

**Section 1.** The right of citizens of the United States to vote shall not be [illegible] or abridged by the United States or by any State on account of race, [illegible] or previous condition of servitude.

**Section 2.** The Congress shall have power to enforce this article by appro[illegible] legislation.

# CONSTITUTION OF THE UNITED STATES OF AMERICA

## 14th Amendment

## Amendment XIII. Slavery abolished; enforcement

**Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**Section 2.** Congress shall have power to enforce this article by appropriate legislation.

### Historical Notes

**Proposal and Ratification**

This amendment was proposed to the legislatures of the several States by the Thirty-eighth Congress, on January 31, 1865, and was declared, in a proclamation of the Secretary of State, dated December 18, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States. The States which ratified this amendment, and the dates of ratification, are: Illinois, Feb. 1, 1865; Rhode Island, Feb. 2, 1865; Michigan, Feb. 2, 1865, Maryland, Feb 3, 1865; New York, Feb. 3, 1865; Pennsylvania, Feb. 3, 1865; West Virginia, Feb. 3, 1865; Missouri, Feb. 6, 1865; Maine, Feb. 7, 1865; Kansas, Feb 7, 1865; Massachusetts, Feb. 7, 1865, Virginia, Feb 9, 1865, Ohio, Feb 10, 1865, Indiana, Feb 13, 1865, Nevada, Feb. 16, 1865; Louisiana, Feb. 17, 1865; Minnesota, Feb. 23, 1865; Wisconsin, Feb. 24, 1865; Vermont, Mar. 9, 1865; Tennessee, Apr. 7, 1865; Arkansas, Apr. 14, 1865; Connecticut, May 4, 1865; New Hampshire, July 1, 1865; South Carolina, Nov. 13, 1865; Alabama, Dec. 2, 1865; North Carolina, Dec. 4, 1865, and Georgia, Dec. 6, 1865.

The Legislatures of the following States ratified this amendment after Dec. 6, 1865; Oregon, Dec. 8, 1865; California, Dec. 19, 1865; Florida, Dec. 28, 1865 (Florida again ratified on June 9, 1868, upon its adoption of a new constitution); Iowa, Jan. 15, 1866; New Jersey, Jan. 23, 1866, Texas, Feb. 18, 1870, Delaware, Feb. 12, 1901; Kentucky, Mar. 18, 1976, and Mississippi, Mar. 16, 1995

### Library References

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Westlaw Topic No 356.

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C.J.S. Slaves § 10.

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Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination justifying relief in federal court, 4 A.L.R. Fed. 449.

## Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a

State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Historical Notes

**Proposal and Ratification**

This amendment was proposed to the legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." Accordingly the Secretary of State accordingly issued a proclamation dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 4, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan 15, 1867; West Virginia, Jan 16, 1867, Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868, Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869, Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequently ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, 1868, respectively.

The State of New Jersey expressed support for this amendment on Nov. 12, 1980.

## Cross References

Due process guarantee, see U.S.C.A. Const. Amend. V.

## Library References

Constitutional Law ⇐209 to 320.5.

States ⇐18.

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C.J.S. Right to Die § 2.

C.J.S. States § 6.

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Regulation of practice of photography, 7 A.L.R.2d 416.

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Requirement that court advise accused of, and make inquiry with respect to, waiver of right to testify, 72 A.L.R.5th 403.

Right of jailed or imprisoned parent to visit from minor child, 15 A.L.R.4th 1234.

Same-sex sexual harassment under state anti-discrimination laws, 73 A.L.R.5th 1.

"State-created danger," or similar theory, as basis for civil rights action under 42 U.S.C.A. § 1983, 159 A.L.R. Fed. 37.

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## Amendment XV. Universal male suffrage

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Section 2. The Congress shall have power to enforce this article by appropriate legislation.

# UTAH CONSTITUTION

## Article I Section 12

1953, 78–12–25.5; Const. Art. 1, § 11. Klatt v. Thomas, 1990, 788 P.2d 510. Appeal And Error 1177(1)

## Sec. 12. [Rights of accused persons]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the scope of that examination is limited to determining whether probable cause exists, unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

1994, S.J.R. 6, § 1, adopted at election Nov. 8, 1994, eff. Jan. 1, 1995.

### Cross References

Rights of defendant, criminal procedure, see § 77–1–6.

### Law Review and Journal Commentaries

Confrontation Rights and Preliminary Hearings Modified, 1986 Utah L. Rev. 75 (1986).

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Toward a Framework for Assessing When a Defendant is Capable of Knowingly and Intelligently Waiving the Right to Counsel, 1994 Utah L. Rev. 325 (1994).

Utah Supreme Court and the Utah State Constitution, Marsden, 1986 Utah L. Rev 319 (1986).

Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Implications, Michie, 15 J. Contemp. L. 81 (1989).

# APPENDIX A

## Commitment, Judgment and Order of Restitution

FIRST DISTRICT - RICH
RICH COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff, | : | MINUTES<br>SENTENCE, JUDGMENT, COMMITMENT |
| vs. | : | Case No: 051100067 FS |
| JACOB ALLEN WEBB,<br>Defendant. | : | Judge: CLINT S. JUDKINS<br>Date: October 24, 2006 |

PRESENT
Clerk: beckyp
Prosecutor: PRESTON, GEORGE W
Defendant
Defendant's Attorney(s): LAURITZEN, ARDEN W

DEFENDANT INFORMATION
Date of birth: October 16, 1987
Audio
Tape Number: 102406

CHARGES

1. BURGLARY - 3rd Degree Felony
Plea: Guilty - Disposition: 10/24/2006 Guilty

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to a term of 180 day(s) The total time suspended for this charge is day(s).

Credit is granted for 49 day(s) previously served.

Case No: 051100067
Date: Oct 24, 2006

---

SENTENCE FINE

| | | |
|---|---|---|
| Charge # 1 | Fine: | $800.00 |
| | Suspended: | $0.00 |
| | Surcharge: | $381.08 |
| | Due: | $800.00 |
| | Total Fine: | $800.00 |
| | Total Suspended: | $0 |
| | Total Surcharge: | $381.08 |
| | Total Principal Due: | $800.00 |
| | | Plus Interest |

Probation is to be supervised by Adult Probation & Parole.

PROBATION CONDITIONS

Complete alcohol and/or drug counseling - pay all fees and file notice of completion with the Court.
Consume or possess no alcohol/drugs - frequent no places alcohol served or consumed including bars, parties, liquor store.
Violate no laws.
Submit to random search and seizure.
No association with known criminals.
Keep Court informed of current address while on probation.
Defendant will enter into agreement with Probation and abide by all terms and conditions.
Defendant is to be profitably engaged at all times.
Defendant to have a minimum of 2 substance abuse contacts per week
Defendant to complete a Theft course per Probation Officer
Defendant to pay restitutuion in the amount of $1065.00
After Defendant has served 60 days in Jail he may have work release for remainder of Jail time.

Dated this ____ day of _____, 20____.

_____
CLINT S. JUDKINS
District Court Judge

APPENDIX B

**Amended Notice of Appeal**

12.15.06

COPY

A. W. LAURITZEN (1906)
Attorney at Law / Attorney for Defendant
P.O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391

**IN THE FIRST JUDICIAL DISTRICT COURT**
**COUNTY OF RICH, STATE OF UTAH**

| | | |
|---|---|---|
| **STATE OF UTAH,** | ) | |
| Plaintiff, | ) | AMENDED NOTICE OF APPEAL |
| -vs- | ) | |
| **JACOB ALLEN WEBB,** | ) | Case No 051100067 FS |
| | ) | Judge Clint S Judkins |
| Defendant. | ) | |

Pleat take notice that the Defendant Appeals the Judgement of conviction and Sentence entered in the District Court for Rich County on the 29th day of November, 2006 to the Utah Court of Appeals pursuant to the Utah Rules of appellate Procedure.

Dated the 15th day of December, 2006

A W. Lauritzen
Attorney at Law

## CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, AMENDED NOTICE OF APPEAL, postage prepaid, to the following listed below on the 15th day of December, 2006.

Meghan Johnson

George Preston, Esq.
P.O Box 402
Randolph, UT 84064

# APPENDIX C

**State vs. Peterson, 810 P.2d 421, 425 (Utah 1991)**

04/04/91 STATE UTAH v. BRYON DALE PETERSEN

[1] SUPREME COURT OF UTAH

[2] No. 900180

[3] 1991.UT.64 <http://www.versuslaw.com>, 810 P.2d 421, 158 Utah Adv. Rep. 18

[4] April 4, 1991

[5] **STATE OF UTAH, PLAINTIFF AND APPELLEE,**
**v.**
**BRYON DALE PETERSEN, DEFENDANT AND APPELLANT**

[6] Keith H. Chiara, Price, and Allen S. Thorpe, Castle Dale, for defendant.

[7] R. Paul Van Dam, Dan R. Larsen, Salt Lake City, for plaintiff.

[8] Hall, Chief Justice. Richard C. Howe, Associate Chief Justice, I. Daniel Stewart, Justice, Christine M. Durham, Justice, Michael D. Zimmerman, Justice, concur.

[9] The opinion of the court was delivered by: Hall

[10] FACTS. - Peterson was charged with additional crimes while in a Utah prison.

[11] PROCEEDINGS. - He filed a notice and request for Disposition of pending charges on July 12, 1989; however, he was not tried within 120 days of filing the notice for Disposition. His motion to dismiss was denied, and he was convicted. He appealed.

[12] RESULT. - Reversed and dismissed. Per Hall; all concur.

[13] HELD. - UCA 77-29-1(1) required dismissal of the charges. Peterson did not waive his right to dismissal by failing to object to the trial date. Good cause for a continuance was not shown.

[14] Defendant Bryon Dale Petersen appeals his convictions of aggravated burglary, *fn1 a first degree felony; of two counts of attempted second degree murder, *fn2 both second degree

felonies; *fn3 and of being a habitual criminal. *fn4

[15] On July 6, 1989, Petersen was charged with burglarizing the home of Ms. Lola Jewkes and attempting to murder Ms. Jewkes and her daughter. Petersen, having been previously convicted and sentenced to prison for felony offenses, at least one of which was a second degree felony, was also charged with possession of a firearm by a prohibited person *fn5 and with being a habitual criminal. On July 12, 1989, Petersen, who was being held at the Utah State Prison pending a parole revocation hearing, filed a notice and request for Disposition of pending charges ("notice of Disposition"), pursuant to Utah Code Ann. § 77-29-1 (Supp 1989). The notice of Disposition was filed with an authorized agent of the Utah State Prison. Section 77-29-1(2) requires that any custodial officer, upon receipt of a notice of Disposition, "shall immediately cause the demand to be forwarded... to the appropriate prosecuting attorney and court clerk." Section 77-29-1(1) states that a prisoner is "entitled to have the charge brought to trial within 120 days of the date of delivery of written notice." The Emery County Attorney received a copy of the notice of Disposition. However, for unknown reasons, no copy of the notice was found in the trial court's file.

[16] On July 27, 1989, the Emery County Public Defender was appointed to represent Petersen. Petersen was arraigned on September 6, 1989, and at the arraignment, requested that the court appoint different counsel because of Petersen's dissatisfaction with the public defender's handling of his case. Petersen's request for new counsel was denied, and without objection, trial was set for February 15, 1990, 218 days after Petersen filed the notice of Disposition.

[17] On January 5, 1990, Petersen's appointed counsel sought to withdraw from the case, claiming that he was not able to resolve continuing conflicts with his client. On January 12, 1990, the trial Judge denied the motion to withdraw and appointed co-counsel. When Petersen's new defense counsel learned that Petersen had filed a notice of Disposition, a motion to dismiss was filed on the ground that Petersen was not brought to trial within 120 days of the delivery of the notice. On February 15, 1990, a hearing was held and the motion to dismiss was denied.

[18] In dismissing the motion, the trial court found: (1) The county attorney had received the notice of Disposition, but the court had received no notice whatsoever. (2) The court asked Petersen whether the trial date was acceptable, and Petersen did not object to the date. (3) The trial date was set to allow time for defendant and his counsel to resolve their differences. (4) Petersen, as a result of having his parole revoked, has been incarcerated in the Utah State Prison since the filing of the charges. In its Conclusions of law, the trial court ruled: (1) The setting of the trial date for February 15, 1990, occurred within the 120-day period and was for the purpose of allowing time for Petersen and his counsel to resolve their differences and, therefore, constituted a continuance for good cause. (2) Petersen waived the statutory right to a trial within 120 days by not objecting to the trial date. (3) Petersen had the burden of showing that the failure to try his case before the expiration of the statutory period resulted in prejudice to his case or tactical advantage to the prosecutor. (4) Petersen made no showing of prejudice or tactical advantage. (5) The delay was not caused by any action or inaction of the prosecutor

[19] On February 15, 1990, the date of the trial, Petersen moved to disqualify the trial Judge on the ground that the Judge had previously, as a district attorney, prosecuted defendant and had recused himself from presiding over a trial of defendant in December of 1981. The court denied this motion on the ground that it was not timely made.

[20] The aggravated burglary charge and the two attempted murder charges were tried to a jury on February 15 and 16. The jury returned a verdict of guilty on all counts. Following the verdict, defendant waived a jury trial on the charge of being a habitual criminal. The court subsequently found defendant guilty of this charge. The charge of unauthorized possession of a handgun was dismissed. Petersen was sentenced to an indeterminate term of not less than five years nor more than life on each one of the four charges, such terms to run consecutively.

[21] There are three issues presented on appeal. First, Petersen claims that all his convictions should be reversed and all charges dismissed with prejudice due to the State's failure to bring him to trial within 120 days of the date on which the notice of Disposition was delivered to the county attorney. Second, Petersen claims that if this court does not dismiss the charges, he is entitled to a new trial on the grounds of bias and prejudice on the part of the trial Judge. Third, the State, on its own motion, asserts that Petersen was improperly sentenced and asks that the case be remanded for resentencing. *fn6

[22] Petersen's claim that his convictions should be reversed and the charges against him dismissed with prejudice is based on section 77-29-1, *fn7 which reads in pertinent part:

[23] (1) Whenever a prisoner is serving a term of imprisonment in the state prison... and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall cause to be delivered to the warden... or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting Disposition of the charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

[24] ....

[25] (3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

[26] (4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and the defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by

good cause. whether a previous motion for continuance was made or not. the court shall order the matter dismissed with prejudice.

[27] The threshold issue. in determining whether Petersen's convictions should be reversed pursuant to section 77-29-1. is whether the trial court erred in ruling that Petersen waived his rights under the statute by not objecting to the trial date. Whether criminal defendants. after filing notices of Disposition. are required to affirmatively assert their rights under section 77-29-1 is a question of statutory construction and. therefore. a question of law. Questions of law are reviewed for correctness. *fn8

[28] This court has held that criminal defendants have no such duty to object under Utah Code Ann. §§ 77-65-1 to -2 (Supp. 1953) (amended 1980). the predecessor to section 77-29-1. *fn9 In so holding. we stated. "It is apparent that the legislature intended to place the burden of complying with the statute on the prosecutor." *fn10 The language in section 77-29-1 compels the same Conclusion Section 77-29-1(4) states. "If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause... the court shall order the matter dismissed with prejudice." *fn11 This language clearly places the burden of complying with the statute on the prosecutor. Therefore, Petersen, after filing his notice of Disposition, was not required to object to the trial date in order to maintain his rights under section 77-29-1.

[29] Since Petersen did not waive his rights. the determination of whether his convictions should be reversed is dependent on whether. in accordance with section 77-29-1(3). a "reasonable continuance" was granted for "good cause shown" or whether. in accordance with section 77-29-1(4), the trial Judge properly found that the "failure of the prosecuting attorney to have the matter heard within the time required is supported by good cause." Before reaching these questions. however, it is important to note that we have interpreted both section 77-29-1 and its predecessor as granting discretion to the trial court. *fn12 Specifically, in State v. Bonny *fn13 we held that sections 77-65-1 to -2 (1953) (amended 1980) granted trial courts the authority to make reasonable determinations concerning the existence of good cause.

[30] "For a good cause shown in open court the court having jurisdiction in the matter may grant any necessary or reasonable continuance " The emphasized language of the statute just quoted makes it clear that if there is a reasonable basis in the record to support the proposition that the trial court granted a continuance "for good cause shown" it was within [the trial court's] discretion and authority to do so. *fn14

[31] In stating this standard of review. the court relied on language that is consonant with the language of section 77-29-1(3); accordingly. the same standard should apply to the present statute. Although the predecessor to section 77-29-1 did not have a provision parallel to section 77-29-1(4). the decision not to dismiss under section 77-29-1(4) is based on a finding of "good cause." as is the decision to grant a continuance under section 77-29-1(3). Therefore. the same standard of review should be applied to both subsections 77-29-1(3) and (4). *fn15

[32] Before reviewing the record to determine if there is a reasonable basis for the trial court's judgment, however, it is necessary to make primary determinations concerning the content of the record. It is to be noted that trial courts do not have discretion to misapply the law. *fn16 Therefore, legal determinations concerning the proper interpretation of the statute which grants the trial court discretion are reviewed for correctness. *fn17 Similarly, the trial court's factual determinations will not be disturbed unless clearly erroneous. *fn18 It is only after these primary determinations are made that the record can be reviewed for the existence of a reasonable basis for the proposition that good cause existed for the continuance or the delay.

[33] The record supports the trial court's factual findings. In its Conclusions of law, however, the trial court erred in rulings concerning the correct interpretation and application of section 77-29-1. Specifically, the trial court ruled that under section 77-29-1. Petersen had the burden of proving that the delay prejudiced his case or gave the prosecution a tactical advantage. Although the fact that the delay works to the disadvantage of a defendant may be a reason for not finding "good cause," nothing in section 77-29-1 its predecessor, or any of the case law under either statute requires a showing of prejudice in order for the charges against a defendant to be dismissed. On the contrary, section 77-29-1 clearly provides that if there is not good cause for the delay, the court shall order the matter dismissed. The statute makes no mention of the effect of the delay. The only support the State cites for the trial court's position is a case dealing with the constitutional right to a speedy trial. *fn19 However, we have never used the same approach in cases decided under section 77-29-1 or its predecessor as we have used in constitutional cases. *fn20 The Conclusion that Petersen did not carry his burden of showing prejudice, therefore, cannot be used to support the finding of good cause.

[34] It is also to be noted that the trial court erred in ruling that a reasonable continuance was granted tolling the statutory period. Section 77-29-1(3) sets out requirements that must be met before trial Judges, in their discretion, may grant continuances that toll the time in which a defendant must be tried under section 77-29-1. This section provides that "the prosecuting attorney or the defendant or his counsel... may be granted any reasonable continuance." It is clear from the record that neither of the attorneys nor defendant requested or was granted a continuance. The requirements of the statute not being met, the trial court erred in concluding that a continuance was granted under section 77-29-1(3).

[35] This fact, however, is not fatal to State's case. Section 77-29-1(4) states that if a motion to dismiss is brought, the trial court shall review the proceedings. "If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice." This language makes it clear that it is the finding of good cause that is dispositive and not the actual granting of a continuance. The court did find that there was good cause for the delay in that the trial was set to allow time for defendant and his counsel to resolve their differences. The finding of good cause is also supported by the court's Conclusion that the delay was not caused by an action or inaction of the prosecutor.

[36] As the State points out, this court has upheld trial court findings of good cause that were supported, at least in part, by the fact that the delay was not caused by action or inaction of the prosecutor. [1]fn21 However, this factor alone has never been considered dispositive. In the past, we have reversed a trial court's decision not to dismiss, notwithstanding the fact that the delay was not caused by the prosecutor. [4]fn22 Furthermore, in the cases cited by the State, there are other reasons for the finding of good cause, such as a request on the part of the defense for a continuance *fn23 and/or a relatively short delay caused by unforeseen problems arising immediately prior to trial. [1]fn24 In any event, to hold that good cause is supported by the lone fact that the delay was not caused by the prosecutor would contradict the language in section 77-29-1(4) which places the burden of complying with the statute on the prosecution.

[37] It is necessary, therefore, to examine the trial court's Conclusion that the delay was reasonable because it was for the specific purpose of allowing defendant and his counsel time to resolve their conflicts. In some circumstances, conflicts between defendants and their counsel may justify delay. It is to be noted, however, that in the instant case the trial court became aware of the problems 57 days after the notice of Disposition was filed. Arguably, this problem could have been resolved within the time allotted by the statute. Indeed, a review of the record makes it clear that the trial Judge did not feel that such a delay was necessary. When Petersen's counsel, due to continuing conflicts, sought to withdraw 34 days prior to trial, the court denied the motion, appointed co-counsel, and did not continue the trial. In the order appointing co-counsel, the court stated that it did "not wish to delay the trial because of any such conflict." Since a delay was not necessary to resolve the conflict 34 days before the date of trial, a fortiori, a delay was not necessary to resolve the conflict approximately 63 days before the running of the statutory period. *fn25

[38] It should also be noted that there was a long delay inasmuch as the trial date was set for 218 days beyond the time defendant filed the notice of Disposition. Given the fact that the record reveals that the trial court felt the delay was unnecessary, such a long delay cannot be considered reasonable. The Conclusion that the delay was for the purpose of allowing time for defendant and his counsel to resolve their conflicts, therefore, cannot be used to support a reasonable basis for the finding of good cause

[39] The State contends that in State v. Bullock, [1]fn26 this court upheld a finding of good cause under similar facts. Bullock, however, is easily distinguishable from the instant case. First, in Bullock the defense counsel moved for a continuance because he was ill on the date of trial. *fn27 In the instant case, there was no motion for a continuance and the conflict did not arise shortly before trial. Second, in Bullock the continuance only delayed the trial 13 days beyond the original trial date. *fn28 In the instant case, the trial was delayed over 90 days from the running of the statutory period. A review of the proceeding, therefore, does not reveal a reasonable basis for the finding of good cause. Accordingly, pursuant to section 77-29-1, Petersen's convictions should be reversed and the charges against him dismissed with prejudice

[40] Due to our holding regarding section 77-29-1, we do not reach the other issues in the case. However, we feel compelled to again comment on the propriety of trial Judges' presiding over criminal trials when they have previously prosecuted the defendants. In State v. Neeley, *fn29 a case that also dealt with a Judge who presided over a trial of a defendant whom he had previously prosecuted, we stated:

[41] Judge should recuse himself when his "impartiality" might reasonably be questioned. Utah Code of Judicial Conduct 3(C)(1)(b) (1981). This standard set forth by the Code of Judicial Conduct should be given careful consideration by the trial Judge. It may require recusal in instances where no actual bias is shown.... The integrity of the judicial system should be protected against any taint of suspicion.. We recommend the practice that a Judge recuse himself where there is a colorable claim of bias or prejudice.... *fn30

[42] We went on to hold that although Judges should recuse themselves if there are colorable claims of bias or prejudice, absent a showing of actual bias, "failure to do so does not constitute reversible error as long as the requirements of section 77-35-29 [current version at Utah R. Crim. P. 29] have been met." *fn31

[43] The instant case, however, is more troubling than Neeley. In this case, the trial Judge, upon receiving the affidavit alleging prejudice, did not have a second Judge rule on the legal sufficiency of the affidavit as required by rule 29(d), but summarily dismissed the motion on the ground that it was untimely. We are aware of the problems that arise when motions to disqualify are filed the day of trial and stress that we are not deciding the issue of whether the requirements of rule 29 must be complied with under such circumstances. However, because the motion to disqualify was summarily dismissed, we are without a record sufficient to enable us to determine whether the affidavit was filed "as soon as practical" and "in good faith" as required by rule 29(c). It is also to be observed that, assuming the trial Judge was aware of his prior contact with Petersen, the problem could have been avoided had the Judge followed our recommendation in Neeley and, on his own motion, recused himself due to the colorable claim of prejudice.

[44] Pursuant to our holding regarding section 77-29-1, the convictions are reversed and the charges are dismissed with prejudice.

Opinion Footnotes

[45] *fn1 Utah Code Ann. § 76-6-203(1) (Supp. 1989).

[46] *fn2 Utah Code Ann. § 76-5-203(1)(a) (Supp. 1989).

[47] *fn3 Utah Code Ann. § 76-4-102 (Supp. 1989).

[48] *fn4 Utah Code Ann. § 76-8-1001 (Supp. 1989).

[49] *fn5 Utah Code Ann. § 76-10-503 (Supp. 1989).

[50] *fn6 See State v. Williams, 773 P.2d 1368, 1374 (Utah 1989); State v. Johnson, 771 P.2d 1071, 1074 (Utah 1989); State v. Sulling, 770 P.2d 137, 144-45 (Utah 1989) (all holding that the habitual criminal statute does not create a separate crime but operates as an enhancing statute); see also Utah Code Ann. § 76-5-203(2) (Supp. 1989) (second degree murder is a first degree felony); Utah Code Ann. § 76-4-102 (Supp. 1989) (attempted second degree murder is a second degree felony); Utah Code Ann. § 76-3-203(2) (Supp. 1989) (second degree felony is punishable by an indeterminate period of not less than one nor more than fifteen years).

[51] *fn7 Petersen does not claim that his constitutional rights to a speedy trial were violated. See U.S. Const. amend. VI; Utah Const. art. I, § 12. The right afforded by the Utah Constitution is also guaranteed by Utah Code Ann. § 77-1-6(f) (Supp. 1989).

[52] *fn8 E. g., Berube v. Fashion Center, Ltd., 771 P.2d 1033, 1038 (Utah 1989) (statutory construction is a question of law which is reviewed for correctness); Forbes v. St. Mark's Hosp., 754 P.2d 933, 934 (Utah 1988) (statutory construction is a question of law, which is reviewed for correctness).

[53] *fn9 State v. Wilson, 22 Utah 2d 361, 453 P.2d 158, 160 (1969).

[54] *fn10 Id.

[55] *fn11 Utah Code Ann. § 77-29-1(4) (emphasis added).

[56] *fn12 State v. Trujillo, 656 P.2d 403, 405 (Utah 1982) (per curiam) (interpreting section 77-29-1); State v. Bonny, 25 Utah 2d 117, 477 P.2d 147, 147-48 (1970) (interpreting section 77-65-1).

[57] *fn13 25 Utah 2d 117, 477 P.2d 147 (1970).

[58] *fn14 Id. at 147-48 (emphasis in original).

[59] *fn15 See State v. Trujillo, 656 P.2d at 405.

[60] *fn16 See 5 Am. Jur. 2d Appeal and Error § 772 (1962), 4 C.J.S. Appeal and Error § 111 (1957).

[61] *fn17 See Hancock v. Planned Development Corp., 791 P.2d 183, 185 (Utah 1990) (trial court does not have discretion to grant new trial absent one of the grounds specified in the rule); Tangaro v. Marrero, 13 Utah 2d 290, 13 Utah 290, 373 P.2d 390, 391 n.2 (1964) (trial court does not have discretion to grant new trial absent one of the grounds specified in the rule); 5 Am. Jur. 2d Appeal and Error § 772 (1962) (trial court has no discretion to misapply the law); 4 C.J.S. Appeal and Error § 111 (1957) (trial court has no discretion on question of own power); see also, e.g., Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038 (Utah 1989) (statutory construction is a question of law which is reviewed for correctness); Forbes v. St. Mark's Hosp., 754 P.2d 933, 934 (Utah 1988) (statutory construction is a question of law which is reviewed for correctness). See generally State v. Wilson, 22 Utah 2d 361, 453 P.2d 158, 160 (1969) (supreme court interprets sections 77-65-1 to -2 (1953) (amended 1980) and grants no deference to trial court's ruling).

[62] *fn18 See Utah R. Civ. P. 52(a); State v. Ramirez, No. 880425, slip op. at 10-11 n.3 (Utah March 21, 1991); Sweeney Land Co. v. Kimball, 786 P.2d 760, 761 (Utah 1990).

[63] *fn19 State v. Banner, 717 P.2d 1325, 1327-31 (Utah 1986)

[64] *fn20 See State v. Clark, 28 Utah 2d 272, 501 P.2d 274, 276 (1972) (rights under section 77-65-2 (amended 1980) are distinct from constitutional rights to speedy trial).

[65] *fn21 See State v. Stillings, 709 P.2d 348, 349 (Utah 1985) (concerning the Interstate Agreement on Detainers Act, Utah Code Ann. § 77-29-5 (Supp. 1984)); State v. Bullock, 699 P.2d 753, 756 (Utah 1985); State v. Trujillo, 656 P.2d 403, 405 (Utah 1982) (per curiam); State v. Velasquez, 641 P.2d 115, 116 (Utah 1982).

[66] *fn22 See State v. Wilson, 22 Utah 2d 361, 453 P.2d 158, 159-60 (1969). Although Wilson was decided under the previous statute, as noted above the standard for allowing a case to be tried beyond the required time, good cause, is the same under both statutes.

[67] *fn23 State v. Stillings, 709 P.2d at 349; State v. Bullock, 699 P.2d at 756; State v. Velasquez, 641 P.2d at 116.

[68] *fn24 State v. Bullock, 699 P.2d at 756; State v. Trujillo, 656 P.2d at 405

[69] fn25 The statute requires that a defendant be tried within 120 days of the time the notice is delivered, not filed. See § 77-29-1(1), see also State v. Taylor, 538 P 2d 310, 312-13 (Utah 1975) (dealing with section 77-65-2). Since the record does not reveal when the notice of Disposition was delivered to the county attorney, it is impossible to determine the exact date the statutory period ran. However, nothing in the record indicates that the notice of Disposition was not delivered within a reasonable time as required by the statute See § 77-29-1(2); see also State v. Taylor, 538 P 2d at 312-13.

[70] ¹fn26 699 P 2d 753 (Utah 1985)

[71] *fn27 Id. at 756.

[72] *fn28 Id. In Bullock, there was no record of the delivery of the notice of Disposition. Therefore, it is impossible to determine how much time passed between the delivery of the notice and the trial.

[73] ¹fn29 748 P.2d 1091 (Utah 1988)

[74] *fn30 Id. at 1094 (emphasis in original).

[75] *fn31 Id. at 1094-95.

19910404

# APPENDIX D

## Motions to Dismiss

A. W. Lauritzen (1906)
Attorney at Law
P.O. Box 171
Logan, Utah 84321
Telephone: (801) 753-3391

IN THE FIRST DISTRICT COURT
COUNTY OF RICH, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH<br><br>Plaintiff<br><br>vs.<br><br>JACOB A. WEBB<br><br>Defendant. | MEMORANDUM IN SUPPORT OF MOTION TO QUASH BINDOVER<br><br>Case No.051100066 & 67<br>Judge Judkins |

STATEMENT OF FACTS

1. In Information # 051100067 the Defendant was charged on the 6th day of December 2005 with two counts of Criminal conduct alleged to have occurred on the 21st day of October, 2005 as follows:

Count 1: Burglary in violation of Utah Code Annotated 76-6-202 and

Count 2: Theft in violation of Utah Code Annotated 76-6-404

2. In Information # 051100066 the Defendant was charged on the 6th day of December, 2005 with one count of Criminal conduct occurring on the 21st day of October, 2005 as follows:

Count 1: Vehicle Burglary in violation of Utah Code Annotated 76-6-204

3. A Preliminary Hearing was had on the 25th day of April 2006 and the Defendant was bound over with regard to count one in case # 051100067; the objection to the Bindover by Defendant was overruled and this Motion follows.

## ISSUES

**I. Whether a Trailer is, pursuant to Utah Law, classified as a Motor Vehicle or as a Vehicle or is it variously classified as both.**

**II. When the same criminal conduct may be punished in two separate ways is Defendant entitled to, upon Motion, endure conviction and punishment only with respect to the charge imposing the lesser sanction.**

**III. Whether, at this juncture, Defendant is entitled to quashal of the bindover or whether Defendant might, more appropriately, reserve his claim for relief and present it at sentencing, if a conviction occur.**

## DISCUSSION

**I. Whether a Trailer is, pursuant to Utah Law, classified as a Motor Vehicle or as a Vehicle or is it variously classified as both.**

4. Aside form the yet to be answered question as to which of the specified vehicles are referred to in the information ending in 66 and which of the specified vehicles are referred to in the information ending in 67 we note that the Officers narrative provided in discovery specifies that the Burglary was of a **trailer** variously, in describing the event, as " a trailer burglary", "both trailer...", "the gold trailer...", " a trailer "up Pole Canyon", " Pole Canyon trailer.", in reviewing the definitions of, " **Motor Vehicle**", we find the following:

5. The Utah DMV, in specifying Vehicles to be Registered, the requirement is extended to:

> " All cars, snowmobiles, trailers over 750 lbs., motorcycles, boats, trucks, campers and off highway vehicles used in the state of Utah must be registered. Trailers weighing 750 lbs. or less when empty do not have to be registered.

However, any trailer may be registered for your convenience." [emphasis mine] (See Exhibit A attached).

6. In U.C.A. Section 13-14-102 (14)(a) " **Motor vehicle**" is defined as:

(i) a travel trailer;
(ii) a motor vehicle as defined in Section 41-3-102; as follows:
(19)(a) " Motor Vehicle" means a vehicle intended primarily for use and operation on the highway that is:
(i) self-propelled; or
(ii) a trailer, travel trailer, or semitrailer.
(iv) a trailer as defined in Section 41-1a-102; " and [emphasis mine] (A copy of the statute is attached as Exhibit B).

7. In U.C.A. Section 13-14-102 (18)(a) " Recreational Vehicle" is defined as: "a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is either self-propelled or pulled by another vehicle."

(b) "Recreation vehicle: includes:
(i) a travel trailer;
(ii) a camping trailer; [emphasis mine] (A copy of the statute is attached as Exhibit B).

8. In U.C.A. Section 13-14-102 (22) the description refers to a "Travel trailer," "camping trailer." or " fifth wheel trailer" as meaning, a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use that does not require a special highway movement permit when drawn by a self-propelled motor vehicle. [emphasis mine] (A copy of the statute is attached as Exhibit B).

9. In U.C.A. Section 13-14-102 (15) the description defines a :

" New motor vehicle" as meaning, a motor vehicle that has never been titled or registered and ..... unless the motor vehicle is a trailer, travel trailer, or semitrailer, ..."

[emphasis mine] (A copy of the statute is attached as Exhibit B).

10. All of these definitions variously define a Motor Vehicle interchangeably as a Vehicle and as a trailer or camp trailer and further; in this case, the official report describes the burglarized units as "trailers". (See copies of official narratives attached here to as Exhibit C).

11. Based on the information provided in the course of the Preliminary Hearing the 25th day of April and upon the discovery provided to counsel all of the burglarized units are defined under Utah Law as vehicles.

**II. When the same criminal conduct may be punished in two separate ways is Defendant entitled to, upon Motion, endure conviction and punishment only with respect to the charge imposing the lesser sanction.**

12. The charge against the Defendant in Count 1 of the Information ending in "67" is detailed as follows:

> "BURGLARY , a third degree felony, as follows ... the defendant entered or remained unlawfully in a building or any portion of a building with intent to commit:
> (a) a felony; (b) theft;"

13. U.C.A. 76-6-201. provides, in pertinent fact:

> (1) " Building," in addition to its ordinary meaning, means any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein and includes:
> (a) Each separately secured or occupied portion of the structure or vehicle; and
> (b) Each structure appurtenant to or connected with the structure or vehicle.
> (2) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

14. A case of interest in Utah, while unreported, is the Utah Court of Appeals opinion in State v. Cates 2000 UT APP 256 # 990402CA (a copy of which is attached as Exhibit D) Cates appealed a conviction of burglary of a dwelling, a second degree felony, which burglary apparently involved a trailer which had some provision for human habitation. The court of

appeals dealing with the issue presented in that Appeal ruled that a trailer could be, under Utah Law a "building and dwelling" in light of the fact that the trailer relevant to that case was equipped for overnight accommodation and held that the second degree Burglary conviction was supportable. The issue Defendant presses here was not addressed in the Cate ruling and was not, apparently; presented during the appeal or at the trial court level.

15. The issue we address here is whether Vehicle Burglary, a class A Misdemeanor, under the facts of the instant case, literally and effectively proscribes the self same conduct as Burglary, a Second Degree and/or Third Degree Felony and it is thereby required that the defendant be sentenced as a Class A Misdemeanant, the lesser of the two punishments specified for that conduct under Utah Law.

16. The Shondel doctrine was formulated in **State vs. Shondel at** 22 Utah 2d 343, 453 P.2d 146 (1969), and supports Defendants contention and requires that when two different statutory provisions define the same offense, a defendant may avail himself (or herself) of the provision imposing the lesser penalty. See also **State v. Green** 995 P.2d 1250, 2000. Ut. Case # 990281- CA. Copies of the Shondel and Green cases are provided herewith as Exhibit E.

17. In support of Defendant's position that this doctrine applies we compare the charges one to the other:

UCA 76-6-202, Burglary, " ....the defendant entered or remained unlawfully in a building or any portion of a building with intent to commit: (a) a felony; (b) theft: and

UCA 76-6-204, Vehicle Burglary, " ... the defendant unlawfully entered any vehicle with intent to commit a felony or theft.

These two offenses, in light of heretofore specified definitions within the Utah Code

mirror each other. Compare Utah Codes 41-3-102, 13-14-102 and 71-3-102 wherein the definitions of a trailer provide that it is, in fact, a Motor Vehicle or Vehicle. In light of the facts of the instant case no amount of reflection can operate to distinguish the elements of the two specified crimes as other than identical and the statutes thus proscribe the same conduct and by conviction of a miscreant of either, the conviction of the other must automatically occur.

18. The well-established rule is that a statute creating a crime should be sufficiently certain in order that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concomitant of that rule is that a penal statute must be similarly clear, specific and understandable as to the penalty imposed for its violation. The esoteric question which might logically be suggested, that being "whether, in contemplating a misdeed, a miscreant really weighs such matters?" must be left for another day.

19. Where there is doubt or uncertainty as to which of two possible punishments is applicable to an offense the Shondel doctrine mandates that an accused is entitled to any benefit provided by the lesser. Shondel held that the statutes of the state of Utah should be "construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote Justice." This holding was compelled by reference to the language of U.C.A. 76-1-2, 1953. (A copy of which statute is attached as Exhibit F).

20. In the Shondel case, the Defendant was charged and convicted of violation of U.C.A. 58-13a-1(16) [now repealed] but could have, on the same facts, been convicted of violation of U.C.A. 58-33-2 [now repealed]. Due to the uncertainty created by an overlapping of

the statutes the same situation that we see in the instant case arose.[1] Because there was doubt as to which of the two punishments was applicable to the

offense, the Utah Court held that the accused was entitled to the benefit of the lesser and in light thereof the Court remanded the case for proceedings to correct the sentence imposed.

**III. Whether, at this juncture, Defendant is entitled to quashal of the bindover or whether Defendant might, more appropriately, reserve his claim for relief and present it at sentencing, if a conviction occur.**

21. One interpretation of the cases espoused by Defendant above would suggest that the holding only applies as a limitation on sentencing and it might be maintained that the bindover was proper and that Defendant might then be required to answer to the felony charge at any trial; reserving his claim for relief to the time when the sentence was to be imposed.

22. Defendant urges that the court order that the bindover be quashed and that proceedings hereafter be upon misdemeanor charges and again refers to the fundamental fairness requirements imposed by Utah Law UCA 76-1-2 (Supra).

23. Defendant also notes that to proceed under the felony charge superimposes upon this case certain impediments to a just and speedy disposition of the array of charges presented in connection with the alleged episode (the facts, at this point are unclear as to whether more than one burglary actually occurred. [Defendant notes that if common ownership of all burglarized units is proven, and that the various burglaries are shown to have occurred at virtually the same time and place and occurred as part of a single course of conduct the holding in State vs. Crosby, 927 P.2d 638 (1986) may apply.]

24. Notwithstanding nuances that may govern disposition of conduct within the same

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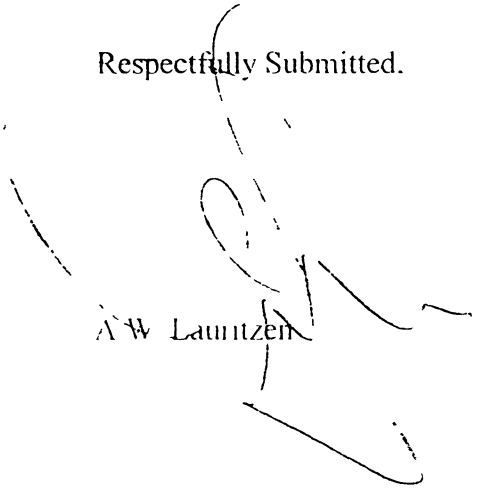
[1] Apparently the drug involved in Shondels case was subject to definitions found in each statute but punishment prescribed in one state varied from and was less than the penalty imposed by the other

criminal episode, the Court might consider the civil disabilities that accompany a felony indictment as well as impediments to the plea negotiation process and compromise of Court resources and judicial economy. These points militate quashal and suggest that the prosecution proceed on appropriately amended informations or, perhaps, on one amended information wherein all alleged criminal conduct is merged.

## CONCLUSION

On the facts of this case the Defendant might be interchangeably charged and convicted of either Burglary or Vehicle Burglary, pursuant to two different but equally valid provisions of the criminal law, and Defendant should therefore be entitled to the benefit of the lesser punishment, regardless of which crime Defendant ultimately stands convicted

Respectfully Submitted.



A W Lauritzen

## CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, MEMORANDUM IN SUPPORT OF MOTION TO QUASH BINDOVER, postage prepaid, to the following listed below on the 10TH day of May, 2006.

Meghan Johnson

George Preston, Esq.
P.O. Box 402
Randolph, Utah
84064

# APPENDIX E

## State vs. Sery 758 P.2d 935 (1988)

07/27/88 STATE UTAH v. MARK JOSEPH SERY

[1] COURT OF APPEALS OF UTAH

[2] No. 860333-CA

[3] 1988.UT.182 <http://www.versuslaw.com>, 758 P.2d 935, 87 Utah Adv. Rep. 32

[4] July 27, 1988

[5] **STATE OF UTAH, PLAINTIFF AND RESPONDENT,**
**v.**
**MARK JOSEPH SERY, DEFENDANT AND APPELLANT**

[6] Karen Stam (Argued), Joan C. Watt, Attorneys at Law, Salt Lake, City, UT

[7] David L. Wilkinson, Attorney General. Kimberly Hornak (Argued). Asst. Attorney General

[8] Before Judges Norman H. Jackson, Gregory K. Orme (concur) and Richard C. Davidson.

[9] The opinion of the court was delivered by: Davidson

[10] FACTS. - Sery arrived at Salt Lake City airport and was stopped by police. Sery's carry-on bag was found to contain cocaine.

[11] PROCEEDINGS. - Sery moved to suppress, and his motion was denied. He pleaded nolo contendere on condition that he be able to appeal the denial of suppression. He was convicted of possession and appealed

[12] RESULT. - Reversed and remanded. Per Jackson; Orme concurs; Davidson Dissents.

[13] HELD. - Conditional plea preserved denial of suppression for appellate review, and conviction on the plea was a final, appealable order. Police lacked reasonable suspicion to stop Sery and search his baggage.

[14] NORMAN H. JACKSON, Judge:

[15] Defendant Mark Joseph Sery appeals his conviction for unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1986). We reverse the trial court's denial of defendant's suppression motion and remand for withdrawal of the plea of no contest underlying the judgment of conviction.

[16] On May 22, 1986, Sery arrived at Salt Lake International Airport at 11:05 a.m. on a Delta Airlines flight from Florida. He was carrying a blue suitcase with brown trim; there was nothing unusual about his appearance or attire. He paused momentarily in the arrival gate area, looked around, waited a few minutes while other passengers passed him, and then started along the concourse, looked around again, and entered a snack bar. In a few minutes, he exited the snack bar with a soft drink. He walked directly across to a bank of pay telephones and sat down in one of the enclosures. While holding a phone receiver, he twice stood up and looked over the booth's partition. Within three to five minutes, he left the phone booth area by a different path than the one he used to enter it, rejoining the concourse past several men standing near the phone booths, and proceeded in the direction of the baggage claim area. At that point, he was stopped by three of the men who had been standing outside the phone booth area after following him from the arrival gate. They identified themselves to Sery as police officers. One was Agent Mark Whittaker of the Utah Narcotics and Liquor Enforcement Bureau; one was Sergeant William Pearson of the Miami, Florida Police Department.

[17] The day Sery arrived, Sergeant Pearson was conducting a drug courier seminar for Salt Lake City police. The training session for twenty to twenty-five officers had moved out of the classroom and into the airport concourses for practical application. Approximately six officers were watching the deplaning of Sery's flight from Florida, including Pearson and Whittaker. As soon as Sery entered the terminal and looked around, Pearson said to trainee Whittaker, "Let's follow him" or "Let's take a look at him." When Sery emerged from the snack bar, Pearson was ten to fifteen feet away from him. While Sery was in the phone booth area, Pearson and several of the trainees stood watching him, some within five feet.

[18] When Sery was first stopped for questioning by Pearson, Whittaker, and another trainee, Pearson asked to see his airline ticket. A ticket bearing the name of Sidsel was produced. Pearson returned the ticket and asked "Mr. Sidsel" for identification. Sery responded that he had none, that his name was not Sidsel, and that the name on the ticket was incorrect due to airline error. According to Pearson, he did not ask Sery for, and Sery did not offer, his correct name. Pearson asked for his destination, which Sery stated was Evanston, Wyoming. Pearson then asked if he could search Sery's carry-on bag. Sery said he would rather Pearson did not. Pearson told Sery he was free to leave.

[19] Sery continued on his way along the concourse, took the escalator down to the baggage claim area, waited for a few minutes, and then left the terminal. He re-entered the building at least once, looked around the baggage claim area, and exited again.

[20] After releasing Sery, Pearson obtained from Delta Airlines--and checked out--the callback phone number that had been left when Sery's ticket was reserved. After discovering that the

number in Ft. Lauderdale, Florida had been changed to a nonpublished number. Pearson ordered a drug detection dog from a local police department.

[21] The dog and his handler arrived at the airport about noon. Shortly thereafter Pearson and other officers again confronted Sery, this time outside the terminal in the passenger pick-up zone. Pearson asked Sery to submit his carry-on bag to a drug detection dog sniff; Sery declined. Pearson then advised Sery that both he and his bag were being "detained" and that he would have to go back into the terminal with them while the bag was presented to the drug detection dog.

[22] After the officers took Sery back inside the terminal, Pearson took Sery's bag, carried it behind the Delta ticket counter to a baggage area out of view and off-limits to the general public, and placed it in a four-bag lineup. The drug detection dog was brought in by his handler and reacted positively to Sery's bag. This information was conveyed by Pearson to Whittaker, who went to the public concourse area where Sery was being detained and informed him that he was under arrest.

[23] A warrant to search the blue carry-on bag was subsequently issued based on Pearson's affidavit. It was found to contain cocaine. Sery moved to suppress this physical evidence on fourth amendment grounds because the officers, at the time they seized Sery and his bag outside the terminal, did not have specific, articulable facts warranting a reasonable suspicion that Sery was carrying illegal drugs in his bag. The trial court, after stating that the question was a close one, denied Sery's motion.

[24] Sery then entered a plea of no contest to the offense of possession of a controlled substance. The plea was explicitly conditional on his preservation of the ability to appeal the court's suppression ruling and to withdraw the plea if it was determined on appeal that the motion to suppress should have been granted. A judgment of conviction was subsequently entered based on the conditional plea.

[25] CONDITIONAL NO CONTEST PLEA

[26] As a preliminary matter, we must address the State's claim on appeal that, although the prosecutor assented on the record to this conditional plea arrangement, the agreement was improper and mistaken. The State now asserts that, under Utah case law, a defendant who pleads no contest waives the right to appeal all pre-trial rulings.

[27] The State argues that, under State v. Beck, 584 P.2d 870 (Utah 1978) (per curiam), and State v. Yeck, 566 P.2d 1248 (Utah 1977), a defendant cannot plead guilty and then base an appeal on alleged errors other than the voluntariness of the plea. In Yeck, the Utah Supreme Court concluded that, by entering a voluntary plea of guilty, the defendant had waived a trial and, with it, the right to claim on appeal that he was denied his right to a jury trial. Similarly, in Beck, the defendant's entry of a voluntary guilty plea to second degree

murder, after a hung jury at his trial for first degree murder, was held to be a waiver of his claim on appeal that the facts underlying his arrest warrant did not constitute probable cause. *fn1

[28] Although neither of these Utah cases involved timely pre-trial suppression motions, they are consistent with the common-law rule that a voluntary guilty plea is a waiver of the right to appeal all non-jurisdictional issues, including alleged pre-plea constitutional violations. E. g., Gordon v. State, 577 P.2d 701 (Alaska 1978); State v. Carter, 151 Ariz. 532, 729 P.2d 336 (App. 1986); State v. Coffin, 104 Idaho 543, 661 P.2d 328 (1983); State v. Rivers, 226 Neb. 353, 411 N.W.2d 350 (1987); Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975); Vogel v. City of Myrtle Beach, 291 S.C. 229, 353 S.E.2d 137 (1987); Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342 (1987), cert. denied, 107 S.Ct. 3277 (1987). This general rule of appellate procedure has been applied in other jurisdictions to preclude appellate review of fourth amendment issues where the defendant entered an unconditional guilty plea after losing the suppression motion. E. g., State v. Defoy, 109 Ariz. 159, 506 P.2d 1053 (1973); Waits v. People, 724 P.2d 1329 (Colo. 1986); People v. New, 427 Mich. 482, 398 N.W.2d 358 (1986), State v. Schulz, 409 N.W.2d 655 (S.D. 1987); State v. Armstrong, 148 Vt. 344, 533 A.2d 1183 (1987). Because the conviction is based on the plea, rather than on the evidence defendant claims was obtained unconstitutionally, State v. Turcotte, 164 Mont. 426, 524 P.2d 787 (1974), the defendant who unconditionally pleads guilty forfeits the right to press his fourth amendment claim on appeal, just as constitutional rights can be forfeited by a failure to raise them in a timely fashion. 4 W. LaFave, Search and Seizure § 11.1(d) (2d ed. 1987) (citing Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214 (1977)).

[29] In Utah, this general rule regarding forfeiture of appellate review of an adverse ruling on a pre-plea motion to suppress applies with equal force to a defendant who enters an unconditional no contest plea, which "if accepted by the court shall have the same effect as a plea of guilty...." Utah Code Ann § 77-13-2(3) (1982). Accord Cooksey v. State, 524 P.2d 1251 (Alaska 1974); Jackson v. State, 294 So.2d 114 (Fla. App. 1974); People v. New, supra. But see City of Huber Heights v. Duty, 27 Ohio App. 3d 244, 500 N.E.2d 339 (1985) (unlike plea of no contest, guilty plea waives claimed errors in denial of suppression motion).

[30] However, the aforementioned general rule is inapplicable where, as here, the plea entered by the defendant with the consent of the prosecution and accepted by the trial Judge specifically preserves the suppression issue for appeal and allows withdrawal of the plea if defendant's arguments in favor of suppression are accepted by the appellate court. See Oveson v. Municipality of Anchorage, 574 P.2d 801, 803 n.4 (Alaska 1978) (approving expressly conditional nolo contendere plea if resolution of reserved issue on appeal is dispositive, refining rule first announced in Cooksey v. State, supra); State v. Ashby, 245 So.2d 225 (Fla. 1971) (approving conditional nolo contendere pleas that reserve questions of law for appeal); State v. Crosby, 338 So.2d 584 (La. 1976) (conditional guilty plea); people v. Reid, 420 Mich. 326, 362 N.W.2d 655 (1984) (approving conditional guilty pleas agreed to by defendant, prosecutor, and trial court if there could be no prosecution if defendant's fourth amendment claim is sustained on appeal) *fn2

[31] We believe the use of such conditional pleas by criminal defendants--if agreed to by the prosecution and accepted by the trial court--is a sensible and sound practice. *fn3 If a case ultimately hinges on the admissibility of evidence whose acquisition is challenged by the defendant on constitutional grounds, forcing the parties to go through an entire trial merely to preserve the suppression issue is a pointless and wasteful exercise. See United States ex rel. Rogers v. Warden of Attica State Prison, 381 F.2d 209, 214 (2d Cir. 1967) (forced trial in these circumstances would be a "waste of time, money and manpower").

[32] It is true that a conditional plea reserving a suppression issue for appeal does not have the complete finality of an unconditioned plea, but it still results in a judgment of convictions not an interlocutory order. That judgment is as final as any conviction after trial that might be reversed on direct appeal. Note, Conditional Guilty Pleas, 93 Harv. L. Rev. 564, 574 (1980). See people v. Reid, 362 N.W. 2d at 660. The essence of the conditional plea

[33] is that the legal guilt of the defendant exists only if the prosecution's case rests on admissible evidence. The crux of the dispute is resolution of the alleged error on appeal, not factual guilt or innocence. The conditional plea is tailored to further the resolution of these specific issues at the reasonable expense of any state interest in obtaining finality in the proceedings. The plea continues to serve a partial state interest in finality, however, by establishing admission of the defendant's factual guilt. The defendant stands guilty and the proceedings come to an end if the reserved issue is ultimately decided in the government's favor.

[34] Comment, Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Non-jurisdictional Issues, 26 UCLA L. Rev. 360, 378 (1978). We see no logical inconsistency between a plea that admits factual guilt--or refuses to contest it--and the preserved claim on appeal that the government is constitutionally barred from being able to prove its case because of the illegal seizure of evidence.

[35] We hold that conditional pleas of the sort in issue here, when agreed to by the defendant and the prosecution and approved by the trial court, are permissible in Utah even though they are not specifically authorized by the statutes governing the entry of pleas by criminal defendants. *fn4 See Utah Code Ann. § 77-13-1 (1988); Utah Code Ann. §§ 77-13-2,-3,-6 (1982); Utah Code Ann. § 77-35-11 (1988). Conditional plea agreements were accepted by the state courts in Oveson, Ashby, Crosby, and Reid, cited above, despite the absence in those jurisdictions of any authorizing court rule or statute. They were also accepted by two federal circuits long before the 1983 adoption of Fed. R. Crim. P. 11(a)(2), which for the first time affirmatively authorized conditional pleas of guilty or nolo contendere that preserved a federal defendant's right to appellate review of adverse pre-trial rulings, including those on fourth amendment issues. See United States v. Moskow, 588 F.2d 882 (3d Cir. 1978); United States v. Burke, 517 F.2d 377 (2d Cir. 1975) (pre-trial motion to suppress). *fn5 More recently, the defendant in United States v. Place, 462 U.S. 696, 700 (1983), had pleaded guilty but expressly reserved the right to appeal the denial of his suppression motion. The United States Supreme Court tacitly approved of that conditional

plea practice, notwithstanding the lack of any authorizing statute or rule, by addressing the merits of the fourth amendment issue and affirming the Second Circuit's reversal of the trial court's denial of defendant place's motion to suppress. *fn6

[36] Unlike the defendants in Beck and Yeel., Sery did not forfeit his claim that he was seized in violation of the fourth amendment by entering an unconditional plea. Instead, he specifically preserved that claim as part of the plea agreement. The prosecution agreed to that condition on the record; the court accepted the agreed-upon conditional plea. The defendant relied thereon and proceeded accordingly. Inasmuch as the court and counsel agreed on the procedure and it is not otherwise prohibited, we find no error.

[37] SEIZURE OF DEFENDANT

[38] The fourth amendment to the United States Constitution, applicable to the states through the fourteenth amendment, Mapp v. Ohio, 367 U.S. 643 (1961), provides:

[39] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[40] In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court first recognized a limited exception to the fourth amendment's requirement that all "seizures" of persons must be based on probable cause. Since the intrusion in Terry involved a brief "stop and frisk" for weapons, and not an arrest, the Court held that probable cause was not necessary. Nonetheless, in order to justify under the fourth amendment even this lesser intrusion, Terry held that the police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. The Court pointed out that this requirement of specificity in the information upon which police action is predicated is "the central teaching" of its fourth amendment jurisprudence. Id. at 21 n.18. It enables a reviewing court to assess the reasonableness of the police action against an objective standard, not the subjective good faith of the individual officer.

[41] The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a Judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be Judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple "'good faith on the part of the arresting officer is not enough.'... If

subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."

[42] Id. at 21-22 (citations and footnotes omitted). See State v. Trujillo, 739 P.2d 85, 88 (Utah App. 1987). Stressing that each case must be decided on its own facts, the Terry court concluded that the limited stop and frisk was justified where "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot...." Terry, 392 U.S. at 30. This language in Terry is now referred to as the "reasonable suspicion" test, see, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975), and has been codified in this state in Utah Code Ann. § 77-7-15 (1982). *fn7

[43] A temporary detention or seizure is "justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime." Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion). Based on the totality of the circumstances, the detaining officers must have a particularized and objective basis for suspecting criminal activity by the particular person detained. United States v. Cortez, 449 U.S. 411, 417-18 (1981). See State v. Mendoza, 748 P.2d 181, 183 (Utah 1987).

[44] On appeal, Sery argues that his detention by Pearson and the other officers, after being stopped the second time outside the terminal, constituted an arrest unsupported by probable cause. Alternatively, defendant asserts that the detention constituted a seizure within the meaning of the fourth amendment that was unlawful because not based on Pearson's reasonable suspicion of criminal activity. In its brief, the State denies that the detention was an arrest" for which the fourth amendment requires probable cause. However, the State agrees that Sery was "seized" for fourth amendment purposes when he and his bag were detained by the officers for the canine drug check. See United States v. Place, 462 U.S. 696, 708-709 (1983); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.) (person is "seized" if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave). But the State claims the seizure was not unconstitutional because Pearson had the necessary reasonable suspicion of criminal activity to conduct the type and length of detention to which Sery was subjected. In view of the State's position, if we conclude that there was not a sufficient basis for even a Terry stop, we need not consider whether there was probable cause to support an arrest.

[45] The trial court determined that the articulable facts known to Pearson supported a reasonable suspicion of criminal activity by Sery when he and his bag were seized outside the terminal. Assuming that Sery's detention was an investigatory stop and not an arrest requiring probable cause, *fn8 the threshold issue is whether this determination is clearly erroneous. Mendoza, 748 P.2d at 183 (citing Cortez, 449 U.S. at 418). The trial court's finding is clearly erroneous only if it is against the clear weight of the evidence or if we reach a definite and firm conviction that a mistake has been made. State v. Vesh, 745 P.2d 1255, 1258 (Utah 1987); State v. Walker, 743 P.2d 191, 193 (Utah 1987). We need not examine the reasonableness of the nature, duration and scope of the detention and investigation unless we first conclude that the seizure was constitutionally valid at the outset. See United States v. Sharpe, 470 U.S. 675, 682 (1985).

[46] We conclude that the articulable objective facts known to Sergeant Pearson when he seized Sery and his bag did not support a reasonable suspicion that Sery was engaged in criminal activity. Accordingly, the trial court's denial of defendant's motion to suppress the evidence found in his bag was clearly erroneous

[47] Seven facts were enumerated by res respondent in support of the reasonableness of Pearson's suspicion: *fn9 (1) Sery arrived from Florida; (2) waited a few minutes at the gate and looked nervously around there and before entering the snack bar; (3) went to a telephone booth and twice stood up and looked in the direction of the officers; (4) took a strange route from the phone booth area back to the concourse; (5) possessed a plane ticket on which he claimed his name had been inaccurately recorded; (6) told Pearson he had no identification on him; and (7) left a telephone number with the airline reservationist that had been changed to an unpublished number. *fn10

[48] Although the government may present a lengthy list of detailed observations, the courts are not relieved of their duty to review the list critically and decide whether each particular observation cited actually contributes something to the "whole picture"--that is, whether the particular observation bears any reasonable correlation to a suspicion that the person presently is engaged in criminal activity.

[49] United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987).

[50] In State v. Mendoza, 748 P.2d 181 (Utah 1987), the Utah Supreme Court reviewed the constitutional validity of an investigatory vehicle stop preceding a search that yielded marijuana. There, seven facts were articulated by the officers in support of the reasonableness of their suspicion: (1) the occupants appeared to be of Latin descent; (2) route of travel; (3) time of day; (4) time of year; (5) California license plates; (6) an erratic driving pattern; and (7) nervous behavior. A comparative analysis with Mendoza is illuminating. We begin with "nervousness," the second Sery fact and the last Mendoza fact.

[51] A. "Nervousness"

[52] In Mendoza, the officers' Conclusion of nervousness on the part of the car occupants was based on a "white-knuckled," rigid look and failure to make eye contact. Those descriptions were not given any weight by the court in determining if the officers had a reasonable suspicion to conduct an investigatory stop. Id. at 184. Here, there was no attempt by Pearson to articulate any specific objective fact underlying his subjective Conclusion, other than to say that Sery was "looking around," *fn11 something many passengers do when they first reach the arrival gate, especially if they expect to be met by someone and that person is not readily seen. Pearson did not claim that Sery's "looking around" was in any way unusual for an arriving passenger. No observations of "nervousness" were made either when Sery was first approached and questioned by the

identified officers or later when he was detained. His responses indicate calm and deliberate behavior rather than agitation and apprehensiveness. The fact that Sery was still waiting at the airport an hour after being followed from the arrival gate and then questioned by police belies the nervous label. Sery did not take flight or behave as if he was avoiding apprehension, as would be expected of the truly nervous suspect.

[53] Nervousness is the most subjective of the characteristics relied on here. Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas," 65 B.U.L. Rev. 843, 903 (1985). If the officer cannot articulate the unusual mannerisms or actions by the defendant that led to a Conclusion of nervousness, it is impossible for any reviewing court to determine, after the fact, whether the person's apparent nervousness was any different from that observed in countless travelers--or if the nervousness existed at all. [fn12 See id. In fact, Pearson testified that Sery's behavior was not unusual, i.e., no different than that of other deplaning passengers. The officer's mere Conclusion regarding defendant's nervousness, unsupported by relevant objective facts, can have no weight in determining if he had a reasonable suspicion of criminal activity. Cf. State v. Dorsey, 731 P.2d 1085, 1088 (Utah 1986) (officer's determination of probable cause justifying a warrantless vehicle search must be evaluated in light of his or her experience and training "where there are objective facts to justify the Conclusion").

[54] B. Itinerary

[55] In Mendoza, the car occupants' route of travel and California license plates were found to have little probative value in determining whether the officers had a reasonable suspicion justifying the stop of the car. Mendoza, 748 P.2d at 183. Those facts are similar to the fact that Sery came to Utah on a Delta flight originating in Florida, which likewise has little probative value. The record does not clearly show the city in Florida from which Sery came. Pearson testified, very generally, that Miami is a known source of the supply of drugs for the west coast. He also testified he was watching Sery's flight with the trainees because "Florida is a known source of, specifically, cocaine and marijuana to the western and northwestern United States. There was no testimony that Sery's particular route of travel (somewhere in Florida to Atlanta to Salt Lake City) or flight was frequently used to transport illegal drugs to Utah, while in Mendoza the officers testified Interstate 15 was frequently used by illegal aliens from Mexico. See id. Salt Lake City is a major hub for airline flights to and from many places. In Mendoza, the court considered it unlikely that illegal alien transporters comprised a significant portion of I-15 traffic. It seems equally unlikely that drug couriers comprise a significant portion of the travelers through Salt Lake International Airport, even of those whose flights originated in Florida.

56] The officers testified in Mendoza that they relied on "erratic" driving behavior in the form of failure to yield lane, change of lane, and rapid deceleration; the court, however, could not see how this behavior could reasonably give rise to a suspicion that the car occupants were engaged in illegal activity. Id. at 184. Here, Pearson attached significance to the fact that Sery sat down in a phone booth and twice stood up and looked over the dividing partition. We fail to see, and Pearson did not say, how this behavior varies from that of any other arriving passenger who keeps looking around the terminal area for whoever was

supposed to meet him or her at the arrival gate, or who looks around in search of someone who might be willing to provide the change necessary to complete the telephone call. See Reid, 448 U.S. at 441 (all but one of the characteristics relied upon by the detaining officers "describe a very large category of presumably innocent travelers").

[57] Pearson also found it "strange" that Sery left the bank of phone booths by a different path than the way he had entered it, rejoining the main concourse hallway at a point that was "beyond" Pearson and the trainees but, presumably, further along Sery's route down the concourse. This path was strange, Pearson asserted, because Sery "kind of edged his way between the glassed-in wall area and pay phones. Neither the trial court nor counsel asked Pearson to diagram the scene or add flesh to his cursory account by giving the actual layout and dimensions of the space or the location of the officers. The record shows that, while Sery was in the phone booth, some of the surveilling trainees were within five feet of him. The path chosen by Sery could have been the one most available to him if the officers were blocking the route by which he had come.

[58] C. Name Discrepancy

[59] Furthermore, Pearson did not articulate, and we cannot discern, any special meaning that should be given to the error Sery claimed the airline made in the name in which they issued his ticket. This fact is transformed by the State in its brief (and, notably, not by Pearson at the suppression hearing) into the "fact" that Sery was traveling under an "assumed name, one of the facts the United States Supreme Court has suggested could, in tandem with other relevant facts, justify an investigative detention of a passenger and his luggage. Royer, 460 U.S. at 502.

[60] Pearson testified that, after Sery told him his name was not what appeared on the ticket, *fn13 he did not ask Sery for his correct name and Sery did not offer it. Although Pearson asked Sery to produce some identification other than his ticket, Sery replied that he had none. *fn14 The officer thus had nothing with which he could compare the name on the ticket. Pearson stated he did not know defendant's real name until after Sery was arrested by Whittaker. He, therefore, did not know and could not have known until after the seizure whether defendant was using an assumed name, as opposed to a misspelled name on the ticket due to travel agent or airline error. Cf. Mendenhall, 446 U.S. at 548 (defendant voluntarily showed drug agents a driver's license in the name of Sylvia Mendenhall and a ticket issued in the name of Annette Lord).

[61] D. Unpublished Phone Number

[62] In this appeal, even the State concedes that Pearson lacked sufficient articulable objective facts to support a reasonable suspicion of criminal activity by Sery up through the point when Pearson told Sery he was free to leave, i.e., after asking him some questions and being refused consent to search Sery's bag. Pearson also must have concluded, drawing on his nine years of experience in drug courier interception, that the actions he had perceived

up to that point did not, even taken together, provide him any legal basis to detain Sery involuntarily. But, the State argues, "[a]fter the initial encounter with defendant the officers obtained additional facts which caused them to believe defendant was committing a crime." Brief for Respondent at 14 (emphasis added).

[63] The only further investigation Pearson did after the first encounter was to obtain and call the callback number Sery had left with the airline reservationist. The only "additional fact" Pearson learned was that "it had been changed to a nonpublished number." This added nothing meaningful or probative to that which he had already observed and evaluated. Pearson stated at the hearing he did not know when Sery had made his reservation or when the number called had been changed to a nonpublished number. Despite this, both Pearson and the respondent twist this into the "fact" that Sery left a "nonworking" number with the airline when he bought his ticket. The fact that a phone number left with an airline (on some unknown date) was changed to an unlisted number (on some unknown date) could not--in light of all the circumstances and the objective facts known to him--lead Pearson to a reasonable suspicion of criminal activity.

[64] Conclusion

[65] We recognize that a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer. Mendenhall, 466 U.S. at 563 (quoting Brown v. Texas, 443 U.S. 47, 52 n.2 (1979)); Trujillo, 739 P.2d at 88. See also Brignoni-Ponce, 422 U.S. at 885. If Pearson perceived any such meaning in Sery's actions, he did not articulate that meaning to the trial court.

[66] The objective facts relied upon by Pearson do not support a reasonable suspicion that Sery was engaged in criminal activity. We hold that the trial court's determination to the contrary was clearly erroneous. Because the seizure of Sery and his bag for the canine drug sniff violated defendant's fourth amendment rights, the evidence found in the search of his bag should have been suppressed. The order of the trial court denying defendant's suppression motion is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

[67] RICHARD C. DAVIDSON, Judge: (Dissenting)

[68] I respectfully Dissent because I believe the majority erred in affirming the trial court's acceptance of a no contest plea conditioned on defendant's right to appeal the motion to suppress. I also believe the majority incorrectly decided that the motion to suppress should have been granted.

[69] Rather than point out weaknesses in the majority's recitation of the facts, I offer what I consider to be a complete factual statement of the case but one which highlights certain important aspects. At approximately 11:05 a.m. on May 22, 1986, Delta Airlines Flight No.

565, originating in Florida, began deplaning passengers at the Salt Lake International Airport. Observing were several law enforcement officers involved in a training seminar. Approximately 20 members of different police agencies were training at the airport in several groups. Conducting the training was Sergeant William Pearson of the Metro Dade Police Department, Miami, Florida. Sergeant Pearson, a veteran of over 25 years in police work had spent 19 years enforcing narcotics laws. Subsequent to extensive training in narcotics surveillance, investigation, and enforcement, Sergeant Pearson has supervised the drug interdiction unit, primarily concerned with the Miami International Airport, for nine years. During this time, Sergeant Pearson has taught his specialty at colleges and to other police departments throughout the United States including Los Angeles, Denver, and Gainesville, Florida. Among those at the airport with Sergeant Pearson was Agent Mark Whittaker from the Utah State Narcotics and Liquor Law Enforcement Bureau.

[70] The officers saw defendant leave the aircraft carrying a vinyl suitcase. Sergeant Pearson testified that defendant stopped momentarily, looked nervously around, waited there for several minutes while other passengers passed him, and then continued on up the concourse." Agent Whittaker testified that defendant appeared to be very nervous" when he deplaned and that, while the other passengers walked past him, defendant "kept looking around nervously." Referring to defendant, Sergeant Pearson indicated to Agent Whittaker, "Let's take a look at him" or, "Let's follow him."

[71] Defendant proceeded up the concourse until he entered a coffee shop after he "looked nervously around again." Upon exiting the coffee shop, defendant proceeded directly to a bank of telephones separated by partitions. Defendant sat down and picked up a telephone receiver but did not place any money in the machine. Defendant then "put the receiver to his ear, he stood up, looked around, sat back down." Agent Whittaker testified defendant repeated his behavior two or three times without ever inserting any coins into the telephone. Sergeant Pearson testified defendant stood up above the partition on two occasions and looked in his direction. Further testimony by Agent Whittaker indicated Sergeant Pearson and he were about five feet away. Defendant then picked up his suitcase but, rather than taking the normal route from the telephone area, he edged his way between a glass wall and the telephones allowing him to leave the telephone area beyond where the officers were standing.

[72] At this point, Sergeant Pearson, Agent Whittaker, and one other officer approached defendant and identified themselves as police officers. Sergeant Pearson asked to speak to defendant "for a moment" to which defendant agreed. When asked, defendant showed Sergeant Pearson his airline ticket which was in the name of Sidsel. Sergeant Pearson then asked "Mr. Sidsel" for some identification to which defendant replied that his name was not Sidsel, that the airline had made a mistake, and that he did not have any identification. Defendant did not offer his correct name. When asked if he had "any objections to giving [Sergeant Pearson] a consent to search the suitcase," defendant replied he would rather not. Sergeant Pearson then thanked defendant and informed him he was "free to leave." Agent Whittaker testified that after leaving the officers, defendant proceeded further down the concourse to another telephone area and made calls, Defendant then went to the baggage claim area via the escalator. He waited in that area for several minutes, walked around the downstairs area of the terminal, and went outside on at least one occasion. Meanwhile,

Sergeant Pearson determined from Delta Airlines that defendant had arrived from Ft. Lauderdale, Florida and also obtained the "call-back number" given when Sidsel's ticket was reserved. Upon checking the telephone number, Sergeant Pearson discovered, "It was no longer a working number. It had been changed to a nonpublished number." Sergeant Pearson then requested Agent Whittaker to obtain a drug detection dog.

[73] At approximately noon, Officer Brook Plotnik, a dog handler with the West Valley City Police Department, arrived with a drug trained dog. After briefing Officer Plotnik, Sergeant Pearson and Agent Whittaker approached defendant who was seated outside the terminal with his suitcase. From the first conversation with Sergeant Pearson until this second approach by the officers, no law enforcement officer had approached or talked to defendant. Sergeant Pearson asked defendant if he would submit his bag "to a sniff by a drug detection dog." Again, defendant answered that "he would rather not." Defendant was then told by Sergeant Pearson that he and his suitcase were being detained and the suitcase would be presented in a lineup to the drug detection dog. Depending on what happened at the lineup, defendant would be informed of "the next step in the procedure" Sergeant Pearson placed defendant's suitcase in a lineup with four other bags in the Delta Airlines baggage makeup area, approximately 10 to 15 minutes after Officer Plotnik's arrival. The drug detection dog gave a positive alert to defendant's suitcase. Sergeant Pearson relayed this information to Agent Whittaker who informed defendant of the results of the lineup, placed him under arrest, and informed him of his rights. A search warrant, based on Sergeant Pearson's affidavit, was obtained. A subsequent search of defendant's suitcase revealed three bags of cocaine. Agent Whittaker's report indicates defendant was arrested at 12:25 p.m. Defendant also testified 20 minutes elapsed between the time he was detained and when he was placed under arrest.

[74] Defendant's pre-trial motion to suppress was heard on July 9, 1986. When asked what actions of the defendant aroused his suspicions, Sergeant Pearson replied:

[75] The ones I have testified to earlier. Number one, his apparent nervous looking about when he got off the plane. The fact that he waited there at the deplaning area before he proceeded on to the concourse to wherever he was going to go. His nervous looking about before he went into what I call the coffee shop.

[76] When I went to the pay phone bank, number three, the fact he was, I would guess, making a phone call. But he kept popping up concerned about my whereabouts and Agent Whittaker's whereabouts, as opposed to concentrating his conversation with whomever he was trying to call. This what I find a strange way of exiting the phone enclosure instead of going out with ease into an open area to walk between enclosures and a side hole next to a phone enclosure and a windowed area to the concourse. The fact that after he left, refused to give us a consent to search and was allowed to go on his way. His constant popping in and out of the terminal and walking around. And the fact that he, that the phone number that he gave to the airlines was not a working number, which would mean the airline could never call him and tell him his flight had been cancelled, delayed or whatever.

[77] All these things, accumulatively speaking, I felt very suspicious

[78] Upon denial of his motion, defendant pled no contest to unlawful possession of a controlled substance Defendant's plea was couched as

[79] [Defense Counsel] Your Honor in view of that ruling we're prepared at this time to enter a conditional plea of no contest to the charges

[80] I would like to have the opportunity to appeal on the motion, and and I decided, in view of the Utah Supreme Court's decision in the Kay [State v Kay, 717 P 2d 1294 (Utah 1986)] case where they did allow for conditional pleas, that Mr Sery can enter a plea on the condition that should the Supreme Court find this motion should have been granted, he can withdraw the plea

[81] I think this may be a new thing to do but I think it would probably help judicial administration There's no sense in going through a trial on facts such as this and would ask the Court to go along with it I have explained it to Mr Sery, he understands it, and he would like to get on with the process rather than wait around for a trial

[82] That's correct, your Honor

[83] Defendant's plea was accepted and he was subsequently sentenced to the Utah State Prison for a period not to exceed five years The prison sentence was stayed and defendant was placed on probation for a period of 18 months Probation was stayed pending the issuance of a certificate of probable cause which was signed on September 25 1986

[84] CONDITIONAL NO CONTEST PLEA

[85] Utah Code Ann § 77-13-2 (1982) explains the effect of a no contest plea In to an indictment or information Subsection 77-13-2(3) states

[86] A plea of no contest indicates the accused does not challenge the charges in the information or indictment and if accepted by the court shall have the same effect as a plea of guilty and imposition of sentence may be rendered in the same manner as if a plea of guilty had been entered

[87] Utah Code Ann § 77-13-3 (1982) also states, "A plea of no contest may be entered by the accused only upon approval of the court and only after due consideration of the views of the parties and the interest of the public in the effective administration of justice

[88] The plea of no contest is treated the same as a plea of guilty: once knowingly and voluntarily entered, there are no issues remaining for trial. State v. Yeck, 566 P.2d 1248, 1249 (Utah 1977). In State v. Beck, 584 P.2d 870, 872 (Utah 1978), the Court wrote, "By a plea of guilty the defendant waived any claim of error on behalf of the officer in saying that he had been identified as the murderer." A defendant cannot enter a guilty or no contest plea and then base an appeal on objections to the evidence. By entering such a plea, all such objections are waived.

[89] The majority states in footnote 4 that the absence in Utah R. Crim. P. 11, Utah Code Ann. § 77-35-11 (1988), of conditional pleas is not an affirmative bar to such pleas. The majority also cites State v. Kay, 717 P.2d 1294 (Utah 1986), as authority for conditional pleas. This is irrelevant. In Kay, the trial court accepted a guilty plea to three counts of capital homicide in exchange for the promise that defendant would not be sentenced to death. The trial court agreed to impose one of the statutory punishments for the crimes charged and defendant pled guilty "with no strings attached." There was no plea conditioned on an appeal concerning the state's ability to prove Kay's underlying guilt. What the majority fails to understand is that is established by statute. As such, it must be strictly construed within the statutory bounds. Counsel and the trial court may not invent a new plea by agreement any more than they can agree to add or delete an element of a crime.

[90] A further examination of Rule 11 in subsection (c) reveals:

[91] The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:

[92] (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements (emphasis added)[.]

[93] In light of this rule it is impossible for defendant to enter a no contest plea after his motion to suppress has been denied, yet still base an appeal on that motion. In effect, defendant told the trial court that he was guilty of possession of a controlled substance but that he intended to contest his own admission on appeal. When the trial Judge explained the meaning of the no contest plea to defendant, he stated that defendant would still have the right to appeal "because of the stipulated facts in this particular instance here...." This does not comport with the requirements of Rule 11(e). See State v. Gibbons, 740 P.2d 1309, 1313 (Utah 1987), for a strict interpretation of the necessity to comply with Rule 11(e).

[94] INTERLOCUTORY APPEAL

[95] When this case is stripped of its pretensions we find an attempt to circumvent the rules of appellate procedure to force this Court to hear an interlocutory appeal. This is justified and

approved by the majority in order to avoid a "pointless-and wasteful exercise." As I read R. Utah Ct. App. 5(d), that is precisely the reason for an interlocutory appeal. However, R. Utah Ct. App. 5(a) provides that a petition seeking permission to appeal must be filed with the Court. The Court may then decide to review or not review. The appellate court, not counsel, and not the lower court, is given the opportunity to determine whether the appeal should be taken and whether further proceedings at the trial level would be desirable or a "pointless and wasteful exercise." In this case counsel and the trial court decided to allow a direct appeal to this Court without a prior trial. The request by defense counsel and by the court shows that this is an appeal from the denial of the motion to suppress and nothing more. There is no way under the rules to make such a denial a final order without pleading not guilty and going through a trial. Unless the majority has decided to leave applications of the rules of this Court to counsel and the lower court such appeal is improper.

[96] This case should be remanded and the defendant given the opportunity to enter a proper plea. Until that is done and the correct procedures are followed to bring the case on appeal, this Court has no business reviewing the factual findings. However, the majority has chosen to render an advisory opinion. Since I strongly disagree with the conclusion, I am forced also to write an advisory opinion.

[97] SEIZURE OF DEFENDANT

[98] I disagree with the majority that defendant's fourth amendment rights were violated and that the evidence found in the search of his suitcase should be suppressed.

[99] Defendant first argues that his detention, and that of his suitcase for investigative purposes, constituted an unlawful seizure because the officers lacked reasonable suspicion that he was involved in criminal activity. Second, defendant asserts that no probable cause existed upon which to base his arrest.

[100] In State v. Deitman, 739 P.2d 616, 617 (Utah 1987), the Court cited United States v. Merritt, 736 F.2d 223 (5th Cir. 1984), cert. denied, 476 U.S. 1142 (1986), for the "three levels of police encounters with the public which the United States Supreme Court has held are constitutionally permissible[.]" The Fifth Circuit Court wrote:

[101] (1) an officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will;

[102] (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop".

[103] (3) an officer may arrest a suspect if the officer has probable cause to believe an offense

has been committed or is being committed. See Florida v. Royer, 460 U.S. 491, 498-99, 103 S. Ct. 1319, 1324-25, 75 L.Ed.2d 229, 236-37 (1983).

[104] Merritt, 736 F.2d at 230.

[105] Concerning the first of the three levels of police encounters, in State v. Trujillo, 739 P.2d 85, 87-88 (Utah App. 1987), this Court wrote:

[106] seizure within the meaning of the fourth amendment does not occur when a police officer merely approaches an individual on the street and questions him, if the person is willing to listen. However, the person approached is not required to answer the officer's questions, and his refusal to listen to the officer's questions or answer them, without more, does not furnish reasonable grounds for further detention (footnote and citations omitted).

[107] In their brief, the state conceded the police lacked reasonable suspicion when they initially approached defendant. However, what little information provided by defendant was given freely and he was not detained against his will. This clearly was a level one encounter.

[108] From the time of the initial encounter, shortly after 11:05 a.m., defendant wandered the terminal area without restraint until the drug detection dog was in place at several minutes past noon. At that point defendant was detained and his suitcase taken to be included in the lineup presented to the dog. This was a level two encounter requiring the officer to have reasonable suspicion.

[109] The touchstone case applicable to this situation is Terry v. Ohio, 392 U.S. 1 (1968). The proposition for which Terry is known has been codified as Utah Code Ann. § 77-7-15 (1982) which states:

[110] A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of actions.

[111] Again, as noted by the majority, Terry admonishes the judiciary to decide each case on its own facts and that a police officer may detain an individual for the purposes of a Terry stop where he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Id. at 30. See also United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) ("In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."); State v. Mendoza, 748 P.2d 181, 183 (Utah 1987). The trial court "must consider the totality of the circumstances facing the officers" and the "reviewing court should not overturn the trial court's determination unless it is clearly erroneous." Id. (citation omitted). The detaining officer's experience in similar cases is an important factor a trial court must weigh in

determining if the officer had valid reasonable suspicion. The factors making up such suspicion must be considered in total context rather than in a vacuum. I believe Sergeant Pearson did have reasonable suspicion which he clearly articulated at the suppression hearing. Defendant initially appeared nervous. He appeared nervous to both Sergeant Pearson and Agent Whittaker. The nervousness was exhibited when deplaning, on the concourse, and upon entering the coffee shop. Nervousness alone does not prove reasonable suspicion because such behavior may be consistent with innocent as well as criminal conduct. Trujillo, 739 P.2d at 89. But it is a factor to be considered. Defendant also waited in the deplaning area while the other passengers walked past him. Again, a factor to alert a trained officer to the need to investigate further, a duty of the police. State v. Houser, 669 P.2d 437, 439 (Utah 1983). Defendant's behavior at the telephone and his not inserting a coin in the machine is another factor. The initial approach and contact was made after defendant made his unusual exit from the telephone area, another factor.

[112] During the initial stop, the officers discovered defendant's ticket was written in a name denied by defendant to be his and he carried no identification, two more factors to be considered. Subsequent to this valid stop, Sergeant Pearson learned that the flight had originated in Ft. Lauderdale, Florida and that the telephone number given upon reserving the ticket was no longer working and had been changed to a nonpublished number, additional factors. Agent Whittaker also knew defendant had utilized another telephone further down the concourse to make calls. The totality of this behavior was sufficient to generate a request for the drug detection dog. Between the time of the request and the arrival of the dog, defendant's "constant popping in and out of the terminal and walking around" added further fuel to Sergeant Pearson's suspicions. Defendant was not detained until such time as Sergeant Pearson had abundant, articulable and reasonable suspicion. [1] fn2

[113] DETENTION OF DEFENDANT

[114] I now address whether defendant's detention was proper. The primary concern is whether the length of the detention transformed it from a Terry stop into a de facto arrest. United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 1574 (1985). The United States Supreme Court has stated:

[115] n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

[116] Florida v. Royer, 460 U.S. 491, 500 (1983) (citations omitted). Guidance is provided in determining what would be "sufficiently limited in scope and duration" by the Court in United States v. Place, 462 U.S. 696 (1983). There, Place's behavior aroused the suspicion of law enforcement officers who were observing activity at an airport. Ultimately, Place's

luggage was presented to a drug detection dog which reacted positively to one bag which was found to contain cocaine. The Second Circuit Court reversed place's conviction and the United States Supreme Court affirmed although the Court wrote approvingly of the use of a dog in the examination of luggage suspected of containing drugs. Id. at 707, it held:

[117] Although the 90-minute detention of [place's] luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion

[118] Id. at 710.

[119] The United States Supreme Court held a defendant's detention to be unlawful when the defendant was confined in a "large storage closet" with a detective for approximately IS minutes while another detective retrieved defendant's luggage, brought it to the place of confinement, and opened the two suitcases. Royer, 460 U.S. at 507-08. Conversely, the Court upheld a 20-minute detention during which the police proceeded expeditiously in confirming their suspicion that defendant was involved in criminal activity Sharpe, 470 U.S. at 687-88. The Court stated that its cases "impose no rigid time limitation on Terry stops," emphasized the need "to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes," and that there was no "bright line" rule. Common sense and ordinary human experience must take precedence over some rigid criteria. Id. at 685.

[120] The hearing transcript indicates defendant was told his suitcase was being taken into the airport security area (the Delta Airlines baggage makeup area), into which those without the appropriate security clearance were not allowed, that the suitcase would be included in the lineup, and the next step depended on what happened at the lineup In any event, it would be further explained to defendant Sergeant Pearson testified that, if the dog had not alerted on the suitcase, it would have been returned to defendant and he "would have been allowed to leave." During the period the suitcase was taken, defendant was not confined in any manner. Agent Whittaker testified that, when he departed the lineup area after being told of the positive alert, defendant "was seated at one of chairs out in the concourse area. Defendant claims 20 minutes elapsed between the time he was detained and when he was placed under arrest. During this period, Sergeant Pearson rendered his explanation concerning the suitcase to defendant, the bag was taken into the lineup area, the lineup was arranged, the drug detection dog was introduced to the lineup, and Agent Whittaker walked back out of the lineup area to where defendant was seated I believe the investigative methods employed by the police during the detention were minimally intrusive and that the duration was limited to that necessary to effectuate the purpose of the detention.

[121] In his initial brief, defendant claims the officers did not have probable cause to arrest him. His argument centers on a lack of reasonable suspicion and that the detention exceeded the scope of a Terry stop. I have already discussed these issues but to lay the matter to rest, I

need only restate the testimony of Agent Whittaker concerning the dog's reaction when confronted by defendant's suitcase. He stated, "I observed the dog jump on Mr. Sery's bag, attempt to bite it, was scratching it and was very excited." I submit that was probable cause of a very convincing nature.

[122] The majority opinion fails to provide the law enforcement community of Utah with any guidance as to what the officers should have done to have been correct. The obvious message to law enforcement is to leave people alone unless probable cause is present. I strongly disagree. This case should stand as a model of proper police procedure and a demonstration of the step by step development of reasonable suspicion.

[123] The lower court was correct in denying the motion to suppress. It was in error in allowing the entry of an invalid plea. I believe the majority in this case is wrong on both issues.

Opinion Footnotes

[124] *fn1 Furthermore, because Beck pleaded guilty to second degree murder and had no trial on that charge, he was precluded from challenging the sufficiency of the evidence at his hung jury trial on the first degree murder charge. State v. Beck, 566 P.2d at 872.

[125] *fn2 A few states have statutorily exempted alleged fourth amendment violations from the common-law waiver rule, specifically permitting appellate review of the denial of a suppression motion even though the judgment of conviction appealed from is based on the entry of a guilty plea. E. g., Cal. Penal Code § 1538.5(m) (West 1982); N.Y. Crim. Proc. Law § 710.70(2) (Consol. 1984); Wis. Stat. Ann. § 971.31(10) (West 1985)

[126] *fn3 New York's statute, (supra) note 2, has been described by the United States Supreme Court as a commendable effort "to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution" Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975) (per Stewart, J.) One writer has argued that the United States Constitution compels courts to give defendants the option to plead conditionally guilty because an unconditional plea system needlessly burdens fourth amendment rights by forcing the defendant to choose either the benefits of plea bargaining or preservation of the constitutional issues for appeal. Note, Conditional Guilty pleas, 93 Harv. L. Rev. 564, 577-85 (1980). The four main arguments against the conditional plea practice were analyzed and rejected by the drafters of the current rule governing federal criminal procedure. Fed. R. Crim. P. 11(a)(2) advisory committee notes, reprinted In 3A C. Wright, Federal practice and procedure 77-80 (Supp. 1987). See also Comment, Conditioned Guilty pleas: Post-Guilty Plea Appeal of Non-jurisdictional Issues, 26 UCLA L. Rev. 360, 375-82 (1978)

[127] *fn4 We recognize that some state courts have refused to permit the defendant, the prosecution, and the trial Judge to make such conditional plea agreements without a specific authorizing statute or court rule. See, e.g., State v. Amsberg, 27 Ariz. App. 205, 553 P.2d 238 (1976); State v. Dorr, 184 N.W.2d 673 (Iowa 1971) (conditional plea reserving search and seizure issues for appeal is unauthorized interlocutory appeal); State v. Turcotte, 164 Mont. 426, 524 P.2d 787 (1974) (conditional guilty plea agreement is not statutorily authorized and cannot be used to preserve fourth amendment issue for appeal). Unlike our Dissenting colleague, however, we do not construe the absence of any mention of conditional pleas in Utah Code Ann. § 77-35-11 (1988), Utah R. Crim. P. 11, as an affirmative bar to such arrangements. Indeed, the Utah Supreme Court recently approved of a guilty plea conditioned on the imposition of an agreed-upon sentence although Rule 11 makes no mention of any type of conditional plea. State v. Kay, 717 P.2d 1294 (Utah 1986).

[128] *fn5 Contra United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973); United States v. Swann, 574 F.2d 1316 (5th Cir. 1978) (conditional pleas inappropriate in absence of authorizing rule or statute); United States v. Clark, 459 F.2d 977 (8th Cir. 1972); United States v. Benson, 579 F.2d 508 (9th Cir. 1978) (conditional plea has no statutory basis and is contrary to prior United States Supreme Court decisions); United States v. Brown, 499 F.2d 829 (7th Cir. 1974) (conditional plea logically inconsistent and thus improper).

[129] *fn6 Previously, the Supreme Court had considered and rejected on the merits a defendant's claim that his prosecution was barred by the statute of limitations, even though he had pleaded nolo contendere after his motion to dismiss was denied by the trial court. Jaben v. United States, 381 U.S. 214 (1965). As the court in United States v. Doyle, 348 F.2d 715, 719 (2d Cir. 1965), pointed out, the record in Jaben showed that defendant's plea was explicitly conditioned on the right to appellate review of the limitations issue.

[130] *fn7 That statute provides:

[131] A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

[132] Utah Code Ann. § 77-7-15 (1982).

[133] *fn8 The United States Supreme Court has recently acknowledged that its prior decisions "may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest." United States v. Sharpe, 470 U.S. 675, 685 (1985). In another airline passenger detention case, the Fifth Circuit Court of Appeals has stated that, except in the context of border searches, successive investigatory stops of an individual based on the same information strongly indicate that an arrest requiring probable cause has taken place:

[134] The coercion inherent in the successive stop situation must be acknowledged. Otherwise, an intrusion which can be much more severe than an actual arrest will be allowed to take place on the basis of much less justification

[135] United States v. Morin, 665 F.2d 765, 769 (5th Cir. 1982)

[136] *fn9 The United States Supreme Court has scrutinized stops of airline passengers exhibiting "drug courier profile" characteristics in three cases. United States v. Mendenhall, 446 U.S. 544 (1980); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam); Florida v. Royer, 460 U.S. 491 (1983). More recently, in Florida v. Rodriguez, 469 U.S. 1 (1984) (per curiam), the Court ruled on a Terry stop in an airport that was apparently not initiated based on a match-up with formal profile characteristics.

[137] In Mendenhall, the facts relied on by agents for their suspicion of criminal activity were: defendant arrived from Los Angeles; was the last to leave the plane; appeared nervous; scanned the arrival area; did not claim luggage; and changed airlines. The Court did not reach a consensus on the appropriate reasoning to the result reached. Two of the majority held there was no seizure because the entire encounter with the agents was consensual; the reasonable suspicion issue was not reached by them. The three Concurring Justices assumed there was a Terry seizure and found reasonable suspicion. The four Dissenters felt there was a seizure without reasonable suspicion of criminal activity. In Reid, the agent was held to lack any reasonable suspicion based on the facts that defendants: arrived from Ft. Lauderdale; in the early morning; with only carry-on bags; and appeared to the agent to try to conceal their travel together. In Royer, plurality held the police conduct exceeded the permissible scope of a Terry investigative stop, turning the encounter into an arrest for which there was no probable cause. The four Dissenters concluded there was reasonable suspicion for defendant's stop based on the facts that he: carried two heavy American Tourister bags; was young; casually dressed, appeared nervous; looked around; was flying out of Miami, a major drug distribution center; paid for his ticket with small bills; did not complete the baggage ID tag; and traveled under an assumed name. Finally, in its per curiam decision in Rodriguez, the Court assumed there was a seizure of defendant but held it was justified by an articulable suspicion of criminal activity because defendant had: spoken furtively with his confederates after spotting the plainclothes officers; was told by one confederate to "Get out of here, attempted to evade the officers; and gave contradictory statements concerning his identity during the consensual encounter before the seizure.

[138] These results have led one noted commentator to conclude:

[139] From Reid, Mendenhall, Royer and Rodriguez, it cannot be said with assurance what combination of factors from the "drug courier profile," if any, will suffice to justify a Terry stop. But some Conclusions may be reached from these decisions. For one thing, the fact the traveler has come from a "major source city" is of some significance, but--for the reasons stated in Reid --is hardly a weighty factor. Clearly that factor alone will not justify a stop. Nor will that factor suffice in conjunction with some other circumstance which is highly ambiguous, such as that the traveler appears nervous

[140] 3 W LaFave, Search and Seizure § 9 3(c) (2d ed 1987) (footnotes omitted)

[141] *fn10 Sergeant Pearson disclaimed any use of a drug courier profile as the basis for his stops of Sery. Nonetheless, the facts he relied on closely parallel the characteristics listed in a typical drug courier profile. A useful and enlightening empirical analysis of drug courier profile characteristics appears in Cloud, Search and Seizure by the Numbers: The Drug Courier profile and Judicial Review of Investigative Formulas, 65 B U.L. Rev 843 (1985). The author selected ninety different reported opinions from state and federal appellate courts involving 103 defendants The opinions studied were issued by twenty-seven different courts during the period from August, 1975 through December, 1983 Id at 888. The methods employed were designed to yield fact-based information Providing insight into the use of the drug courier profile and its impact on judicial decision-making The study presents a comprehensive overview unavailable to courts reviewing the facts of individual cases and calls for additional scrutiny of the profile using other systematic methods:

[142] The drug courier profile has never been subjected to process of validation. The government has not conducted any systematic study to determine whether the drug profile has any predictive validity Indeed, the only evidence of its effectiveness has generally been the testimony of agents who utilize the profile in the field This testimony is typically deficient because even when agents "were recognized as having made stops in a substantial number of past instances where their suspicions proved to be correct [there was no] evidence as to the number of instances in which innocent passengers had been subjected by them to investigatory stops."

[143] ... In the rare instances where the government has provided non-anecdotal evidence purporting to establish the profile's validity, the information has been facially deficient. In particular, the data fails to account for all profile-related police encounters with all travelers and provides no evidence indicating that the profile accurately distinguishes drug couriers from innocent passengers

[144] Id. at 875-76 (quoting United States v. Place, 660 F.2d 44, 48-49 (2d Cir. 1981), aff'd, 462 U.S. 696 (1983)). We share the author's concerns about the reliance on drug courier profiles by police and reviewing courts. No litmus-paper test can determine whether the police possessed sufficient facts to justify a person's seizure Id. at 857 The profile formula is such a test. If (a) courts accept the premise that the profile works accurately, i e . identifies couriers and (b) the government shows a trained agent has conformed the traveler to the profile, the courts' reviewing function is virtually eliminated Id. The agent's behavioral interpretation supplants court review because his claims become self-verifying.

[145] Cloud's analysis yielded these Conclusions about the following frequently occurring shared profile characteristics, similar to the seven facts enumerated by the State in the case before us:

[146] (1) Arrival from or Travel to Drug "Source City" or Drug "Use City": The results indicate that the cities of arrival or destination of drug couriers (for those defendants arrested before their flights were completed) are dispersed throughout the country. Id. at 901. "If every area of the nation is suspect [as a drug use location], then every air traveller is potentially a suspect merely by virtue of traveling between two locations." Id. at 900. Furthermore, "drug traffickers may travel to any city in the nation. Suspicion surely cannot attach to a traveler simply because he is going somewhere." Id. at 902.

[147] (2) Nervousness:

[148] According to the police... 50.5% of the defendants exhibited pre-contact nervousness. Although nearly one-half of the defendants did not conform to [this characteristic], the data suggest that it is one of the most significant characteristics to the police. Unfortunately, it is also the most subjective of the characteristics comprising the formal profiles.

[149] Id. at 903.

[150] (3) Using Telephone Upon Arrival: More drug couriers did not make telephone calls than did. Phone calls were made by only 19.4% of defendants in the studied cases. Id. at 906.

[151] (4) Unusual Itinerary: Place-to-place travel by an unusual itinerary (not within the terminal, as with Sery), such as rapid turnaround time, is a characteristic in one standard drug courier profile. Yet only 17.5% of the studied defendants were described as traveling with a fast turnaround time. Id. at 909.

[152] (5) Use of an Alias: Police learned of an alias before making investigative contact with only 3.9% of defendants. Officers learned during the initial contact that 21.4% of the suspects were not using aliases, yet continued their investigations. Id. at 905-06.

[153] (6) Left False Telephone Callback Number with Airline: Leaving a false number may be suspicious because it leaves no record for use in tracing suspects, yet it was attributed to only 11% of the defendants. The reliability of this characteristic is doubtful, since substantial record-keeping problems exist that increase the possibility of a false number report. Any error in reciting the number to the airline, or by the airline in receiving, recording or retrieving, or by the police in doing the same (or in dialing) could lead investigators to conclude incorrectly that the traveler had left a fake number. Id. at 907.

[154] *fn11 Pearson's description of Sery's nervousness is remarkably similar to that used by drug agents to describe the behavior of the defendants stopped in Mendenhall. 446 U.S. at 547 n.1 (deplaning defendant "appeared to be very nervous" and "completely scanned the

whole area where [the agents] were standing"); and Royer, 460 U.S. at 493 n.2 (defendant "appeared pale and nervous, looking around at other people"). These cases illustrate the ease with which agents may make an after-the-fact subjective assertion fitting the suspect into a mode of criminality.

[155] *fn12 In United States v. Sanford, 658 F.2d 342, 345 (5th Cir. 1981), cert. denied, 455 U.S. 991 (1982), the famous drug agent Markonni had asserted he could distinguish innocent nervousness from criminal nervousness. Pearson did not describe Sery's looking around as unusually nervous; his use of this human characteristic must rest on the presumption that drug couriers, afraid of discovery, act differently from innocent travelers and exhibit increasingly nervous behavior when watched, approached, or questioned. The necessity for the officer to make an on-the-spot evaluation of a person's psychological state portends enormous potential for subjective abuse. Air travel frequently involves events and human feelings which spawn nervous and perhaps "suspicious" behavior. Some examples are: frightening, cancelled, or delayed flights; missed connections; late arrivals causing missed appointments; lost tickets or baggage; and dashed expectations of being met by someone. To this list of quotidian travel traumas, we would add: being watched, followed, or accosted by unknown persons for unknown reasons.

[156] *fn13 The court reporter at the suppression hearing first transcribed the stated name on the airline ticket as "Sid Sellow." Thereafter, it was variously transcribed as Sedsel, Sidsel and Sutcel.

[157] *fn14 Respondent cites United States v. Espinosa-Guerra, 805 F.2d 1502 (11th Cir. 1986), as support for the notion that an airline passenger's claim to not be carrying identification other than a ticket is a fact reasonably arousing suspicion in a trained drug agent. In Espinosa-Guerra, however, defendant's claim that he was carrying no identification assumed unusual significance--along with other objective facts articulated by the investigating drug agent--because he was traveling a long distance and did not speak English. Id. at 1508.

[158] 1 Utah Code Ann. § 77-13-1 (1988) lists five kinds of pleas: not guilty; guilty; no contest; not guilty by reason of insanity; and guilty and mentally ill.

[159] 2 In footnote 10, the majority acknowledged that Sergeant Pearson "disclaimed any use of a drug courier profile" in his stops of defendant. However, the majority then discusses at great length a law review article primarily concerned with the profile. Several discrete behavioral factors relative to drug couriers are analyzed and, where possible, a percentage is stated. The percentage relates to those drug courier defendants who exhibited the particular factor. The results are not damning when an individual factor is examined. However, when a defendant exhibits a multiplicity of these factors, the significance of the percentages fades. The bias in the footnote should also be noted. In most, a small percentage is stated to show just how small the percentage of suspects exhibited the characteristic. In the use of an alias the use of the percentage is reversed. In truth, 78.6% of suspects were using aliases as was Sery. While the majority claims the officers did not

know Sery was using an alias, Sery himself told them the ticket was not in his name and that he carried no identification.

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# APPENDIX F

## Information

George W. Preston, 2643
Rich County Attorney
20 South Main Street
Randolph, UT 84064
Telephone: (435) 793-2100
Fax: (435) 793-2101

IN THE FIRST DISTRICT COURT
IN AND FOR RICH COUNTY, STATE OF UTAH

| | |
|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff,<br><br>vs.<br><br>JACOB A WEBB<br>DOB: 10/16/1987,<br><br>Defendant. | **INFORMATION**<br><br>Case No.<br><br>Judge Clint S. Judkins<br><br>OTN #: 67 |

The undersigned George W. Preston, under oath states on information and belief that the defendant, in Rich County, State of Utah, committed the following crime(s):

**COUNT 1:** BURGLARY in violation of Utah Code Annotated §76-6-202, a third degree felony, as follows: That on or about October 21, 2005, in Rich County, the defendant entered or remained unlawfully in a building or any portion of a building with intent to commit: (a) a felony;

(b) theft;

**COUNT 2:** THEFT in violation of Utah Code Annotated §76-6-404, a class A misdemeanor, as follows: That on or about October 21, 2005, in Rich County, the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was or exceeded $300, but was less than $1,000.

This information is based on evidence obtained from the following witness: Mark Lee.

Dated this 6 December 2005

By George W. Preston
George W. Preston
Rich County Attorney

# APPENDIX G

# Utah DMV Vehicle Requirement

Revised April 14, 2006

# Registering Vehicles – General Information

- Pub 9, How To Register Your Vehicle in Utah
- What Vehicles Must be Registered?
- Who Must Register Their Vehicles?
- Where to go and What to Bring
- First Time Registration
- Safety Inspection
- Emission Inspection
- Insurance Requirements

## What Vehicles Must Be Registered?

All cars, snowmobiles, trailers over 750 lbs., motorcycles, boats, trucks, campers and off-highway vehicles used in the state of Utah must be registered. Trailers weighing 750 lbs. or less when empty do not have to be registered. However, any trailer may be registered for your convenience.

## Who Must Register Their Vehicles?

Utah residents must register any of the above vehicles for use in the state.

Nonresidents using their boats, off-highway vehicles and snowmobiles in Utah for more than 14 days per year must register in Utah. For more information, follow these links:

- **OHVs (includes snowmobiles):** http://www.stateparks.utah.gov/ohv/registration.htm
- **Boat Registration:** http://www.stateparks.utah.gov/boating/registering.htm

For vehicle registration purposes, a resident is anyone who engages in a trade, profession, occupation or gainful employment in Utah for more than sixty days.

**Exceptions:** Nonresident students who pay nonresident tuition, certain military personnel and temporary workers may be exempt from registering vehicles.

## Where To Go And What To Bring

Bring to the Division of Motor Vehicles (DMV) the following for each vehicle

- Most recent registration
- Title
- Utah safety inspection certificate, if required
- Utah emission certificate, if required
- Vehicle Identification Number (VIN) inspections, if being titled in Utah for the first time. See Form TC-661, "Certificate of Inspection".
- At least one person whose name will appear on new title

## First-time Registration

# APPENDIX H

## Official Report

Incident Number: 05-1143
Nature: Burglary Case Number: _____ _____ _ Image: ____ -
Addr: Pole Canyon _____ Area: RAND Randolph
City: Randolph St: UT Zip: 84064 Contact:
+- Complainant: 15396 ----------
| Lst: Hines Fst: Linda Mid:
| DOB: / / SSN: - - Adr: 680 E North Street
| Rac: Sx: Tel: (801)622-5454 Cty: Ogden St: UT Zip: 84404
+----------
Offense Codes: BNFE ____ ____ ____ ____ _ Reported: Observed:
Circumstances: _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ -
Rspndg Officers: Mark Lee _____ _____ _
Rspnsbl Officer: Mark Lee Agency: RCSO CAD Call ID:
Received By: Brandi Jones Last RadLog: : : / / ____
How Received: P IN PERSON Clearance: _____
When Reported: 21:26:00 10/21/05 Disposition: CAA Disp Date: 11/16/05
Occurrd between: 21:26:00 10/21/05 Judicial Sts: _____
and: 21:26:00 10/21/05 Misc Entry:
MO: _____ _____ _____ _____
Narrative: Someone broke into thei two campers and took numerous items.
Supplement: (See below) + (See below) +

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INVOLVEMENTS:

| Type | Record # | Date | Description | Relationship |
|---|---|---|---|---|
| NM | 11006 | / / | Dalke, Christopher David | Suspect |
| NM | 11784 | / / | Webb, Jacob Allen | Suspect |
| NM | 14460 | / / | Gray, Skyler | Suspect |
| NM | 15396 | / / | Hines, Linda | *Complainant |

LAW Incident Offenses Detail:

| Seq | Offense Codes Code | Amount |
|---|---|---|
| 1 | BNFE Burglary, Non-res, Forcibl Ent | 0.00 |

LAW Incident Responders Detail

| Seq | Responding Officers Name | Unit |
|---|---|---|
| 1 | Mark Lee | 4 |

** Officer's Report ***

On 10/22/1005 Deputy Schirado and I responded to the Pole Canyon area on report of a trailer burlary. We met with Buddy Hines and his family (wife is listed complainant). Their camp was located at N 41 39.311 N 111 19.570. They left the camp last Sunday night at the close of the elk hunt and returned last night at around 1830 hrs. They discovered both trailer doors were open, the locks either broken or missing and the window of the gold trailer broken out. I photographed both trailers. Deputy Schirado collected some possible contact evidence for processing.

'he following items are missing:

| 'alue | Description |
|---|---|
| ;100 | 3 camp chairs |
| ,100 | Misc. clothing, incl. hoody w/ "ABC Roofing Supplies" |
| 40 | Faded orange/camo hunting vest, "poofy" |
| 50 | Misc. food |
| 50 | DVD player, Colby |
| 100 | Two BB guns, one Red Ryder, another w/ stickers |
| 200 | Ammo (7mm, .30-06, .30-30, .243, 12 ga. |
| 50 | Small green Coleman propane tanks |
| 6 | New blanket w/ Deer on it |
| 90 | Knife sharpening kit in blue case |
| 50 | Other knife sharpening equipment |
| 100 | Hunting and skinning knifes |
| 50 | Gun cleaning kit |

'm relaying specifics of some of these items to local law enforcement fficers for ATL. No suspects at this time.

ee

** Supplemental Report ***

was called to assist Deputy Russell on a possible possession of stolen roperty case on 10/25/2005. After meeting with him, we decided the est approach would be to craft an affidavit requesting a search warrant ıich we did on 10/25 and 10/26.

ı 10/26/2005 I served a search warrant with Agent Bartschi of the ache-Rich Drug Task Force on the Red 1992 Pontiac Sunbird bearing Utah )4MYB located at 160 N. Main, Randolph. In the process of the service, spoke with Jacob Webb (DOB 10/16/1987), an adult, and his mother. We ıvised them of the service and Jacob came out with us to the car. I ecovered a deer print blanket from the back seat of the car, and a blue ody sweat shirt bearing "ABC Supply" on the front and a camo/faded ınter orange reversible pillowed vest from the trunk. I read Jacob .randa from my pocket code booklet and he waived silence and counsel. admitted that he'd gotten the deer blanket and the hoody from a ailer "up Pole Canyon" but wasn't sure about the vest at that time. anwhile, Agent Bartschi recovered two gun cleaning kits from under the ats of the car and a dart set from the glove box. Jacob admitted that ıose items weren't his either.

spoke with Jacob's mom who gave us permission to go into the room at Jacob shares with his older brother. Jacob doesn't pay rent. cob accompanied us into the room and voluntarily ejected a me-recorded videotape from his player (titled "10" in handwriting) and rrendered it along with a box of fuses. He said he got them from a ailer "near Stauffer's Mine" in Lincoln County, Wyoming. He also rrendered a plastic bag full of ammo (seven full or paritial boxes m, one .30-06, and one 12 ga.) which he said he got from the Pole nyon trailer. Jacob's mother gave us a videotape that she'd taken

from Jacob's room because she thought it was inappropriate. The video was a prerecorded VHS tape bearing the title "Raquel Darrian."

Agent Bartschi and I interviewed Jacob in his parents' bedroom on video at 1840 hrs.

Jacob admitted that he'd been up in the Pole Canyon "last Friday" "two days before the hunt started." He described two campers similar to those burgled. He said that the blanket with the deer and the hoody were some of the property taken during the ten minute burglary. He also admitted to being involved in a trailer burglary in Lincoln Co. after the Pole Canyon burglary. He said it was a Sunday. He and an unnamed partner were running out of gas, and they saw a generator near the camp they later burgled so they thought there might be some gas there. There was. The trailer door was open and they took property including poker chips, and alarm clock, "squeeze" Kool aide and "they" brought back other property. With prompting, Jake admitted also taking some videos during this five minute burglary. They came back later and spoke with some guys at the camp who asked them about any information they might have about a burglary. We concluded this short interview at 1845 hrs.

Agent Bartschi agreed to meet with Jake at the Sheriff's Office for a more detailed interview while I collected the property and processed it. We went to the Sheriff's Office. While we were there, Jake's mom called and indicated that she'd discovered other property she believed might be related to our inquiry. Sheriff Stacey went by and picked that property up.

See other supps. for additional information.

Lee
X-ref case 05-1161

# APPENDIX I

## State vs. Musser 118 UT 537, 232 P.2d 193 (1950)

10/20/50 STATE v. MUSSER ET AL.

[1] SUPREME COURT OF UTAH

[2] No. 6818

[3] 1950.UT.78 <http://www.versuslaw.com>, 223 P.2d 193, 118 Utah 537

[4] October 20, 1950

[5] **STATE**
**v.**
**MUSSER ET AL.**

[6] Appealed from Third District court, Salt Lake County, Ray Van cott, Jr., Judge.

[7] Claude T. Barnes, T. H. McKnight, Knox Patterson, Ray S. McCarty, Edwin D. Hatch, Salt Lake City, for appellants.

[8] Grover A. Giles, Attorney General, with Calvin L. Rampton and W. S. Wagstaff, Assistant Attorneys General, Brigham E. Roberts, District Attorney, and H. D. Lowry, Deputy District Attorney, Salt Lake City, for respondent.

[9] Wade, Justice. Wade, Latimer, Pratt, C. J., and Wolfe and Mcdonough, JJ., concur.

[10] The opinion of the court was delivered by: Wade

[11] WADE, Justice.

[12] Section 103-11-1, U.C.A. 1943, denounces as a criminal offense for two or more persons to conspire

[13] "(5) To commit any act injurious * * * to public morals * * *"

[14] Our problem here is to determine whether the broad sweep of that general language, in view of the whole context of that statute and our other statutory and common laws and the history and background of the enactment of that statute may be by construction limited so as to

define the offense therein denounced so as

[15] "to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused"

[16] under that subdivision. Musser v. State, 333 U.S. 95, 68 S. Ct. 397, 398, 92 L. Ed. 562.

[17] Appellants were convicted of an offense under the above subdivision. We sustained that conviction on the grounds that the evidence showed that they were parties to "an agreement to advocate, counsel, advise and urge the practice of polygamy and unlawful cohabitation by other persons". State v. Musser, 110 Utah 534, 175 P.2d 724, 734. Although the appellants urged that their conviction violated the Fourteenth Amendment to the Federal Constitution, the question here presented was never specifically assigned or argued in any court until inquiries from the bench suggested it during the argument before the United States Supreme Court. That court set aside the convictions and remanded the case to us for further consideration. Musser v. State, supra.

[18] The problem which we must decide as stated above, must be answered in the negative. The argument before this court has developed no reason why we should believe that the legislature intended, in using this language, that it should be limited to a meaning less broad than the words therein used would indicate in their ordinary sense. No language in this or any other statute of this state or other law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation theron other than that expressed on the face of the words used. We are therefore unable to place a construction on these words which limits their meaning beyond their general meaning. The conviction of the defendants thereunder cannot be upheld. This part of the statute is therefore void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution.

[19] In the case of City of Price v. Jaynes et al., 113 Utah 89, 191 P.2d 606, 607, we struck down a city ordinance on this ground. That ordinance provided that the right of the people of that city "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated", and denounced the violation of that provision as a crime.

[20] While the wording of this ordinance was taken directly from the Fourth Amendment to the Federal Constitution, and the terms thereof have been many times construed by the courts of this nation, still we were of the opinion that under the decision in Musser v. State, supra, that ordinance was void on account of vagueness and uncertainty. If that ordinance was void on that account and in view of the many judicial constructions which have been placed upon those words, certainly in the absence of any judicial construction of the words of this statute, which is equally vague and uncertain, we are not justified in the absence of some historical basis therefor in limiting this statute by construction.

[21] The judgment of the lower court is therefore reversed. The convictions of the defendants are vacated and set aside.

[22] PRATT, C. J., and WOLFE and MCDONOUGH, JJ., concur.

[23] LATIMER, Justice (concurring in the result).

[24] I concur in the result.

[25] The United States Supreme Court in Musser et al v. State of Utah, 33 U.S. 95, 68 S.Ct. 397, 92 L. Ed. 562, passed back to us a determination of two questions: (1) Whether Section 103-11-1, U.C.A., 1943, is so vague and indefinite that it fails adequately to define the offense or give reasonable standards for determining guilt; and (2) whether the right to raise the first question has been waived or lost because there was a failure to comply with our appellate practice and assign it as error in the first hearing. Admittedly, the first question was not raised before this court in the previous hearing, but in view of the importance of the principle involved, I believe it requires an answer.

[26] Insofar as is material to my decision, Section 103-11-1, U.C.A., 1943, is as follows:

[27] "If two or more persons conspire:

[28] "(1) To commit a crime; or

[29] "(5) To commit any act injurious * * * to public morals, * * * they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000."

[30] I am of the opinion that the conviction could have been sustained under subsection (1) of Section 103-11-1, U.C.A., 1943, had it not been for the theory of the state and the instructions given by the trial court. Both polygamy and cohabitation have been made offenses by our legislature and under subsection (1) when two or more persons conspire to commit either of those crimes they have committed a separate offense.

[31] To illustrate the theory of the trial, the Judge instructed the jury as follows:

[32] "Your attention is directed, however, to the fact that the defendants are not charged specifically with the crime of polygamy, nor specifically with the crime of polygamy, nor specifically with the crime of unlawful cohabitation. They are charged with the crime of conspiracy, conspiracy to do an act injurious to public morals * * * "

[33] "You are instructed that an agreement between two or more persons to advocate, promote, encourage, teach, counsel, advise, and practice polygamous or plural marriages and to advocate, promote, encourage, urge, counsel, advise and practice the cohabitation of one male person with more than one woman, is, as a matter of law, an agreement to do an act injurious to public morals." (Emphasis added.)

[34] These instructions direct the attention of the jurors to the theory that the prosecution is predicated upon a conspiracy to commit acts injurious to public morals and not upon a conspiracy to commit a crime. An agreement between two or more parties to teach polygamy might be considered by a jury as a conspiracy to commit an act injurious to public morals and yet not be considered as a conspiracy to commit a crime. Marrying another while married has been made a statutory offense, but teaching that polygamy should be legalized has not.

[35] The state, having elected to prosecute under subsection (5), cannot now rely on subsection (1) as the jury might have taken a different view under a different theory. Such being the case, we are required to determine whether the conviction can be sustained under the first mentioned subsection.

[36] This court, in the case of Rio Grande Lumber Co. v. Darke et al., 50 Utah 114, 167 P. 241, 242, stated:

[37] "To challenge the constitutionality of a solemn and deliberate act of legislation by the lawmaking power of a sovereign state always presents a serious question, however trifling or insignificant may be the amount involved in the particular case.'

[38] In connection with the present action, its history, background and procedural deficiences, declaring the statute unconstitutional is a serious and delicate task and one which I would not do unless I believed the statute clearly violated the constitutional rights of the appellants. However, this court's duty is to protect these rights of citizens and if a penal statute fails adequately to define an offense so that an ordinary individual cannot tell whether the acts he is committing are legal or illegal it must be held invalid for failing to meet the tests prescribed by the due process clause. The legislature cannot leave to Judges or juries the right to prescribe the elements of an offense. Different courts and different jurors would prescribe different standards and no one would know whether he was a sinner or a saint. As stated by Mr. Justice JACKSON in Musser et al. v. State of Utah, supra:

[39] "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.'

[40] The subsection need not stand by itself as the law of this state. It could be considered in connecton with other statutory enactments or decisions of this court, if there were any, which had a bearing on its interpretation. If other statutes had been enacted which set up the necessary standards, or had this court circumscribed the import of the language, or could it now fix reasonable limits from the language of the act, then the vagueness or uncertainty might be cured. However, a search has convinced me that this court has not by any decision limited the subsection, other provisions of the statutes do not afford definite standards for determining guilt and the language, when given its ordinary meaning, covers so much that it has no bounds.

[41] I might pose the question: How all inclusive is the phrase "contrary to public morals"? It mut be conceded it has wide coverage unless limited by other judicial or legislative pronouncements. It has been suggested that the phrase can be interpreted so as to indicate a legislative intent to limit its effect to those acts which are specified by the legislature in other sections of the statutes as being injurious to public morals. This argument overlooks the fact that if the acts were denounced by the Legislature they would constitute crimes, and that subsection (1) covers those instances where parties conspire to commit a crime. I do not conceive of any act which the legislature has said is prohibited because of being injurious to public morals which has not been made a crime. The Legislature must have contemplated some acts additional to those defined as crimes when it selected the wording it used. The acts encompassed by the phraseology of subsection (5) appear to be those over and above the ones mentioned in subsection (1). Otherwise, the Legislature enacted a useless provision.

[42] In interpreting a statute, the legislature will be presumed to have inserted every part for a purpose and to have intended that every part be given effect. Significance and meaning should, if possible, be accorded every phrase, and a construction is favored which will render every word operative rather than one which makes some phrases or subsections nugatory. If we adopt the foregoing rule of construction we must hold that subsection (5) is a catch-all provision without guides, standards or limits.

[43] There are situations when conspiracies to teach certain dogmas, tenets, or beliefs might be deemed inimical to public morals by some jurist and by some jurors, and yet not be defined by the Legislature as crimes. The teaching of card-playing might be considered by some as being in that category, although the Legislature may not have made such teaching a crime. It is in this aspect that category, although the Legislature may not have made such teaching a crime. It is in this aspect that subsection (5) becomes vagrant and wandering and has no limits. Courts and juries might determine that certain teachings offend against public morals and yet the parties dong the teaching might not be advised by statute or otherwise that they were committing a crime. The standards for an offense would thus be fixed by those who heard the evidence and not by the Legislature, whose duty it is to define crime with some degree of particularity.

[44] In the final analysis, each individual has his own moral codes, private and public, and what acts might be considered as injurious to public morals are as numerous as the opinions of man. The law requires that crimes be defined with more certainty than that.

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# APPENDIX J

**Information #66**

George W. Preston, 2643
Rich County Attorney
20 South Main Street
Randolph, UT 84064
Telephone: (435) 793-2100
Fax: (435) 793-2101

IN THE FIRST DISTRICT COURT

IN AND FOR RICH COUNTY, STATE OF UTAH

| | |
|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff,<br><br>vs.<br><br>JACOB A WEBB<br>DOB: 10/16/1987,<br><br>Defendant. | **INFORMATION**<br><br>Case No.<br><br>Judge Clint S. Judkins<br><br>OTN #: 606 |

The undersigned George W. Preston, under oath states on information and belief that the defendant, in Rich County, State of Utah, committed the following crime(s):

**COUNT 1:** VEHICLE BURGLARY in violation of Utah Code Annotated §76-6-204, a class A misdemeanor, as follows: That on or about October 21, 2005, in Rich County, the defendant unlawfully entered any vehicle with intent to commit a felony or theft.

This information is based on evidence obtained from the following witness: Mike Russell.

Dated this 6 December 2005

By George W. Preston
George W. Preston
Rich County Attorney

**Appendix K**

**State vs. Cates, 2000 UT APP 256 #990402 CA**

# State v. Cates

**2000 UT APP 256**
**Case Number: 990402CA**
**Decided: 09/08/2000**
**Utah Court of Appeals**

Cite as: 2000 UT APP 256, __ __

State of Utah, Plaintiff and Appellee
v.
Rick Keith Cates, Defendant and Appellant
MEMORANDUM DECISION
(Not For Official Publication)
Eighth District, Vernal Department
The Honorable John R. Anderson

Attorneys:
Wesley M. Baden, Vernal, for Appellant
Jan Graham and Karen A. Klucznik, Salt Lake City, for Appellee

Before Judges Jackson, Bench, and Billings.

BILLINGS, Judge:

Defendant appeals his conviction of burglary of a dwelling, a second degree felony. Defendant claims he should only have been convicted of third degree burglary because the camping trailer where he committed the burglary was not a "dwelling."

At issue is whether a rented camping trailer with sleeping quarters, parked in the mountains and being used during the fall deer hunt, is a "dwelling" within the meaning of the Utah burglary statute, Utah Code section 76-6-202. That section provides:

> (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.
>
> (2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Utah Code Ann. § 76-6-202 (1999). The burglary statute defines "building" and "dwelling" as follows:

> (1) "Building," in addition to its ordinary meaning, means any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein . . . .
>
> (2)"Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

Id. § 76-6-201.

Defendant argues the rented camping trailer was a "building" rather than a "dwelling," and he should therefore have been charged with a third degree felony, rather than a second degree felony. We disagree. Defendant ignores the plain language of the statute, case law, and the policy behind distinguishing burglaries of dwellings from those of other types of structures.

Defendant argues that a structure cannot be both a "building" and a "dwelling" under sections 76-6-201 and -202. However, under the plain language of the statute, it is clear that a "dwelling" is a specialized type of "building," one "which is usually occupied by a person lodging therein at night." Utah Code Ann. § 76-6-201(2) (1999). Thus, although not every "building" is a "dwelling," every "dwelling" is necessarily a "building" under the statute. Defendant's assertion that a rented camping trailer cannot be a "dwelling" because it is a "building" is therefore incorrect.[1]

This Court dealt with the interpretation of "dwelling" under section 76-6-201 and -202 in State v. Cox, 826 P.2d 656 (Utah Ct. App. 1992). We held that the statutory term "usually occupied" in section 76-6-201(2) "refers to the purpose for which the structure is used. If the structure is one in which people typically stay overnight, it fits within the definition of dwelling under the burglary statute." Id. at 662. In Cox, the defendant argued that a mountain cabin, occupied less than fifty percent of the time and unoccupied at the time of the burglary, was not a "dwelling" under the statute. See id. We concluded the cabin was a "dwelling," noting that "our second degree burglary statute is intended to protect people while in places where they are likely to be living and sleeping overnight, as opposed to protecting property in buildings such as stores, business offices, or garages." Id.

Like the cabin in Cox, the nature of camping trailers equipped with sleeping quarters is such that persons may typically be expected to use them for overnight lodging, especially in the mountains or camping areas. Indeed, the victims had rented this trailer for the express purpose of staying in it during the fall deer hunt, and had slept in it the previous night. The record reveals the trailer had its own table, bathroom, and beds, and was "self-contained," complete with dishes, pots and pans, and bedding. In short, it was equipped for overnight lodging, and was, when rented and parked, "usually occupied by a person lodging therein at night." Utah Code Ann. § 76-6-201(2) (1999).

Because the trial court correctly interpreted the Utah burglary statute to include a rented overnight camping trailer within the statutory definition of "dwelling," defendant's conviction of second degree burglary is affirmed.

_____
Judith M. Billings, Judge

WE CONCUR:

_____
Norman H. Jackson, Associate Presiding Judge

_____
Russell W. Bench, Judge

**FOOTNOTES**

1. We recognize that the statutory definition of "building" under § 76-6-201(1) includes "any . . . trailer . . . adapted for overnight accommodation of persons." Utah Code Ann. § 76-6-201(1) (1999). However, it is a rule of statutory construction that specific terms control over more general terms. See, e.g., Biddle v. Washington Terrace, 1999 UT 110,¶14, 993 P.2d 875. Thus, the more specific definition of "dwelling" may include a "trailer . . . adapted for overnight accommodations," if the trailer is "usually occupied by a person lodging therein at night." Utah Code Ann. § 76-6-201(1) & (2).

## *Citationizer: Table of Authority*

**The Utah Court of Appeals Decisions**

| Cite | Name | Level |
|---|---|---|
| 826 P 2d 656, | State v Cox | Cited |

**The Utah Supreme Court Decisions**

| Cite | Name | Level |
|---|---|---|
| 1999 UT 110, 993 P 2d 875, | Biddle v Washington Terrace City | Discussed |

Appendix L

**State vs. Shondel at 22 Utah 2d 343, 453 P.2d 146 (1969)**

)4/10/69 STATE UTAH v. HERBERT LEE SHONDEL

[1] SUPREME COURT OF UTAH

[2] No. 11287

[3] 1969.UT.69 <http://www.versuslaw.com>, 453 P.2d 146, 22 Utah 2d 343

[4] April 10, 1969

[5] **THE STATE OF UTAH, PLAINTIFF AND RESPONDENT,**
**v.**
**HERBERT LEE SHONDEL, DEFENDANT AND APPELLANT**

[6] Jay V. Barney, Salt Lake City, for appellant.

[7] Vernon B. Romney, Atty. Gen., Lauren N. Beasley, Joseph P. McCarthy, Asst. Attys. Gen., Salt Lake City, for respondent.

[8] Crockett, Chief Justice, wrote the opinion.

[9] Callister and Tuckett, JJ., concur.

[10] Henriod, Justice (dissenting).

[11] Ellett, Justice (dissenting).

[12] The opinion of the court was delivered by: Crockett

[13] CROCKETT, Chief Justice.

[14] The defendant was charged by information with unlawful possession of LSD (Lysergic acid diethylamide). After an unsuccessful motion to quash, the defendant admitted his possession and was found guilty of a felony as charged and sentenced to the Utah State Prison. He appeals, attacking the validity of his sentence and the statute under which it was imposed.

[15] The question here presented arises because of an uncertainty created by an overlapping of our statutes dealing with such drugs. Under what is called the Drug Abuse Control Law, enacted as Chapter 140, Session Laws of 1967 (§ 58-33-1(d) [U.C.A. 1953]), it is provided:

[16] The term "depressant or stimulant drug" means: (3) Any drug or derivative containing any quantity of d-Lyser-gic acid diethylamide commonly known as LSD.

[17] Section 58-33-2 prohibits possession and Section 58-33-4(a) provides that:

[18] Any person who violates any of the provisions of section 58-33-2 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not more than one thousand dollars or both such imprisonment and fine; * * *.

[19] The overlapping in our statute occurs because the same session of the legislature in Chapter 139 passed an amendment to the Narcotic Drug Act as follows:

[20] § 58-13a-1(16) "Narcotic drugs" means * * * LSD-25, and every substance neither chemically nor physically distinguishable from them.

[21] § 58-13a-2. It shall be unlawful for any person to * * * possess * * * any narcotic drug, except as authorized in this act.

[22] § 58-13a-44. * * * Any person violating any other provision of this chapter shall, upon conviction, be punished for the first offense by a fine of not less than $1,000 or by imprisonment in the Utah state prison for not exceeding five years, or by both such fine and imprisonment, * * *.

[23] We agree with the proposition advocated by the defendant that the equal protection of the laws requires that they affect alike all persons similarly situated. *fn1 It is therefore necessary for us to determine which of the two penalties should apply to persons found guilty of possession of LSD to obviate unequal treatment of such persons under the law. *fn2 We first direct attention to the generally-recognized rule that where there is conflict between two legislative acts the latest will ordinarily prevail. But in this instance that rule is not helpful. Although it is true that the Drug Abuse Control Act was the later enactment by a few days, both statutes were passed at the same session of the legislature, and they have the same effective date. In such a situation the rule that the later act takes precedence over the former has no application unless there is a clearly-expressed intention to that effect. *fn3 We must therefore look to the two statutes vis-a-vis each other.

[24] Looking at the Drug Abuse Control Act by itself, there is a clear and understandable

specification of the drug and that its unlawful possession in punishable as a misdemeanor. However, if that Act is read carefully the situation is beclouded because there is another provision, § 58-33-6(g) which states:

[25] Notwithstanding the other provisions of this act, whenever the possession, sale, transfer, or dispensing of any drug or substance would constitute an offense under this act and also constitutes an offense under the laws of this state relating to the possession, sale, transfer, or dispensing of narcotic drugs or marijuana, such offense shall not be punishable under this act but shall be punishable under such other provision of law.

[26] This reference to "such other provision of the law" leaves one concerned with compliance with the law to search elsewhere to discover whether some "other provision of the law" dealing with narcotic drugs or marijuana prescribes some other penalty for the possession of LSD. The well-established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. *fn4 A fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation.

[27] Related to the doctrine just stated is the rule that where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser. *fn5 This impels the Conclusion here that the clear, specific and lesser penalty prescribed for the offense as a misdemeanor under Sec. 58-33-2 is the one which should be imposed. We say this mindful of our statute which provides that the common-law rule of strict construction of statutes is not applicable in this state. But it is our opinion the Conclusion we have reached is in harmony with that section's further mandate that our statutes should be "construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote Justice." *fn6

[28] It has previously been adjudicated that when the wrong sentence has been imposed, the correct procedure is to impose the proper sentence *fn7 Remanded for proceedings not inconsistent with this opinion.

[29] CALLISTER and TUCKETT, JJ., concur.

[30] HENRIOD, Justice (dissenting).

[31] I Dissent. I would be constrained to concur except for the statement in the main opinion that "where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser." I believe that the quoted statement should be the law, and is the law in at least a great majority of the states other than Utah. In saying this I refer to State v. Twitchell, 8 Utah 2d 314, 333 P 2d 1075 (1959) in which the author of the instant opinion concurred. It seems to e that Twitchell flies in the

teeth of the instant case, and unless overruled, should be controlling here. It seems to me that the Twitchell case supports the Conclusion arrived at in Mr. Justice Ellett's Dissent.

[32] ELLETT, Justice (dissenting).

[33] I Dissent The statutes are too clear for me to see any conflict whatever between them. Title 58, Chapter 33, U C A 1953 is known as the Drug Abuse Control Law It in substance provides amount to an indictable of its provisions amount to an indictable misdemeanor, and it sets forth the punishment therefor in Sec 58-33-4 However, it further provides by Sec. 58-33-6(g), that if a violation of one of its provisions is also a violation of the Uniform Narcotic Drug Act (Title 58, Chapter 13a), then the punishment will be under the latter (a felony) and not under the former (an indictable misdemeanor).

[34] The same legislature which passed the Drug Abuse Control Act also amended the Uniform Narcotic Drug Act so as to include a prohibition against the possession and so forth of LSD-25 [fn1]

[35] It, therefore, seems obvious to me that all the world must know and understand what the punishment for unlawful possession of LSD is I would affirm the judgment and sentence of the trial court.

Opinion Footnotes

[36] *fn1 McDonald v. Commonwealth of Mass., 180 U.S. 311, 21 S Ct 389, 45 L Ed 542

[37] *fn2 Cf. State v. Fowler, 193 N.C. 290, 136 S.E. 709.

[38] [fn3 Cf In re Lewis, Okl., 380 P 2d 697

[39] [fn4 See State v Musser, 118 Utah 537, 222 P 2d 193, 194 United States v L Cohen Grocery Co., 255 U S. 81, 41 S Ct 298, 65 L Ed. 516, and Lanzetta v New Jersey, 306 U S. 451, 59 S Ct. 618, 83 L. Ed. 888

[40] *fn5 State v Brunson, 162 La. 902, 111 So 321, 50 A.L R. 1531; State v. Mitchell, 217 N C. 244, 7 S E.2d 567 and United States v Universal C I T Credit Corp., 344 U S 218, 73 S.Ct. 227, 97 L.E.2d 260

[41] *fn6 § 76-1-2, U.C.A. 1953.

[42] *fn7 State v Justice, 44 Utah 484, 141 P 109

[43] 1 The figure 25 indicates simply the date of discovery of the drug and does not purport to indicate any different form of drug other than LSD

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**Appendix M**

**State vs. Green 995 P.2d 1250, 2000. UT. Case #990281-CA**

State v. Green, 995 P.2d 1250 (Utah App. 02/10/2000)

[1] Utah Court of Appeals

[2] Case No. 990281-CA

[3] 995 P.2d 1250, 2000.UT.0042042 <http://www.versuslaw.com>, 388 Utah Adv. Rep. 23

[4] February 10, 2000

[5] **STATE OF UTAH,**
**PLAINTIFF AND APPELLEE,**
**V.**
**EDWARD DON GREEN,**
**DEFENDANT AND APPELLANT.**

[6] Attorneys: Catherine E. Lilly and Ronald S. Fujino, Salt Lake City, for Appellant Jan Graham and Karen Klucznik, Salt Lake City, for Appellee

[7] Judges Greenwood, Orme, and Wilkins. *fn1

[8] The opinion of the court was delivered by: Wilkins, Judge

[9] OPINION (For Official Publication)

[10] 2000 UT App 033

[11] Third District, Salt Lake Department The Honorable Homer F. Wilkinson

[12] ¶1 Defendant Edward Don Green appeals from a conviction pursuant to a conditional guilty plea for attempted theft, a third degree felony, in violation of Utah Code Ann. §§ 76-6-404 (1999), 76-6-412(1)(a)(iv) (1999), 76-4-101 (1999) and 76-4-102 (1999). We affirm.

[13] BACKGROUND

[14] ¶2 In October 1998, a car carrying the defendant pulled into Murray High School's front lot where defendant's friend Zarah Welch waited to lend him money. When defendant stepped

out of the car, Welch told him that he must accompany her to the store to break a fifty-dollar bill before he could borrow any money. Defendant kissed Welch, then, as if to hug her, slid his hands in the side pockets of her jacket and pulled out the fifty-dollar bill. Welch told defendant to return the money and tried to grab it back but defendant pulled the bill away and jumped into his friend's car and sped off.

[15] ¶3 The State charged defendant with one count of theft from the person of another, a second degree felony, in violation of Utah Code Ann. §§ 76-6-404 and 76-6-412(1)(a)(iv) (1999). After the trial court denied defendant's motion to dismiss or reduce the theft charge to theft of an amount of property valued at less than $300 under Utah Code Ann. § 76-6- 412(d), defendant entered a conditional guilty plea to one count of attempted theft from a person, a third degree felony, in violation of Utah Code Ann. §§ 76-6-404 (1999), 76-6-412(1)(a)(iv) (1999), 76-4-101 (1999) and 76-4-102 (1999). Defendant appeals.

[16] THE SHONDEL RULE

[17] ¶4 The sole issue on appeal is whether the trial court erred in denying defendant's motion to dismiss or reduce the charge of theft from a person (felony theft) *fn2 to theft of property of an amount less than $300 (misdemeanor theft). *fn3 Specifically, we consider whether the felony theft statute proscribes the same offense as the misdemeanor theft statute, requiring that defendant be charged and sentenced under the lesser crime, under State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969).

[18] ¶5 "Our review under the Shondel rule focuses on the trial court's legal conclusions, which we review under a correction-of-error standard, according no particular deference to the trial court's ruling." State v. Kent, 945 P.2d 145, 146 (Utah Ct. App. 1997) (citations and internal quotations omitted).

[19] ¶6 The Shondel doctrine requires that when two different statutory provisions define the same offense, a defendant must be sentenced under the provision carrying the lesser penalty. See Shondel, 453 P.2d at 148; see also W.C.P. v. State, 1999 UT App 035, ¶¶12-15, 974 P.2d 302; State v. Vogt, 824 P.2d 455, 457 (Utah Ct. App. 1991).

[20] However, if the elements of the crime are not identical and the relevant statutes require proof of some fact or element not required to establish the other, the statutes do not proscribe the same conduct and . . . [a defendant] may be charged with the crime carrying the more severe sentence [without violating his due process or equal protections rights], . . . so long as there is a rational basis for the legislative classification. Kent, 945 P.2d at 147 (citations and internal quotations omitted).

[21] ¶7 The State maintains that the Shondel rule is inapplicable here because the substantive elements of the two crimes differ and the Legislature's distinction between these offenses is not arbitrary or irrational. Specifically, it argues that the felony theft statute requires the

property to be stolen "from the person of another" whereas the misdemeanor theft statute does not. Compare Utah Code Ann. § 76-6- 412(1)(a)(iv) (requiring property to be stolen "from the person of another") with Utah Code Ann. § 76-6-412(1)(d) (making it crime to exercise unauthorized control over the property of another with a value of less than $300 with the intent to deprive the person of the property). Relying on State v. Bryan, 709 P.2d 257, 263 (Utah 1985), defendant argues that the words "from a person" in the felony theft statute do not constitute a meaningful or significant distinction from the misdemeanor statute. We reject defendant's argument, and agree with the State that the statutes describe different offenses.

[22] ¶8 While both statutory prohibitions criminalize theft of property, the elements of these offenses significantly differ. The misdemeanor theft statute does not require that the property be stolen from the person of another, and is limited to less than $300 in value. The felony theft statute has no value limitation. More significantly, the felony theft statute involves a direct violation of a victim's personal freedom with the associated increase in the possibility of physical harm. This difference provides an adequate rational basis for a heightened penalty. As such, because significant elements of these offenses are different, and because the Legislature's distinction between the offenses is rationally based, we hold that the Shondel rule does not apply here and affirm the trial court's ruling on defendant's motion to dismiss, and therefore affirm defendant's conviction.

[23] CONCLUSION

[24] ¶9 The elements of the felony theft statute, Utah Code Ann. § 76-6- 412(1)(a)(iv) are distinct from those of the misdemeanor theft statute, Utah Code Ann. § 76-6-412(1)(d). Accordingly, the misdemeanor theft statute does not proscribe the same conduct as the felony statute, and defendant was properly charged with, and sentenced under, the felony theft statute. Affirmed.

[25] Michael J. Wilkins, Judge

[26] ¶10 WE CONCUR:

[27] Pamela T. Greenwood, Presiding Judge

[28] Gregory K. Orme, Judge

Opinion Footnotes

[29] *fn1 . Justice Wilkins heard the arguments in this case and participated in its resolution prior to his swearing-in as a member of the Utah Supreme Court.

[30] *fn2 . Section 76-6-404, the general theft provision, provides: "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (1999). Section 76-6-412(1)(a)(iv), which classifies the various forms of theft, provides: "(1) Theft of property . . . [is] punishable: (a) as a felony of the second degree if the: . . . (iv) property is stolen from the person of another." Id. § 76-6-412(1)(a)(iv) (emphasis added).

[31] *fn3 . Section 76-6-412(1)(d) provides: "(1) Theft of property . . . [is] punishable: . . . (d) as a class B misdemeanor if the value of the property stolen is less than $300." Utah Code Ann. § 76-6-412(1)(d) (1999).

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# Appendix N

# Transcripts

**Transcript #7, Page 6**

contained in this document?

**THE DEFENDANT:** No, sir.

**THE COURT:** Very well. Count one of the case ending 0067 is burglary in violation of Utah Code Annotated section 76-6-202, a third degree felony. The information alleges that you did, on or about October 21st, 2005, in Rich County, entered or remained unlawfully in a building, or any portion of a building, with intent to commit a felony, that is theft.

In case 066 the allegation is vehicle burglary, alleged to have occurred here in Rich County, state of Utah, a class A misdemeanor, alleged to have occurred October 21st, 2005. It is therein alleged that you did unlawfully enter a vehicle with intent to commit a felony or theft.

To those two counts how do you plead?

**THE DEFENDANT:** Guilty.

**THE COURT:** Mr. Preston, give us a factual basis for the two counts, please.

**MR. PRESTON:** Your Honor, the auto burglary is a burglary of a automobile that was out by Mountain Fuel. A stereo was taken and later the stereo was destroyed because apparently Mr. Webb couldn't use it. It's one of those ones that have the detachable front. We have recovered the stereo presently and it is in evidence down in the sheriff's office. The defendant admitted to the burglary of that automobile.

The other situation that he pled guilty to involving the

**Transcript #4, Page 12**

**MR. PRESTON:** Just a minute, please.

(Pause in the proceedings.)

**REDIRECT EXAMINATION**

**BY MR. PRESTON:**

**Q.** How did you determine the value of the property as it relates to the theft?

**A.** Umm, a combination of characterization from the victims and my own reasonable best guess.

**Q.** In your opinion what was the -- in your opinion did the property exceed $300 but was less than $1,000?

**MR. LAURITZEN:** Objection. He's not qualified for that.

**THE COURT:** Overruled. He may give his opinion.

**THE WITNESS:** In my opinion, yes, it was in excess of 300 but less than a thousand.

**MR. PRESTON:** No further questions.

**THE COURT:** Mr. Lauritzen?

**MR. LAURITZEN:** Nothing.

**THE COURT:** Thank you. You may step down. Any other witnesses?

**MR. PRESTON:** No.

**THE COURT:** Mr. Lauritzen?

**MR. LAURITZEN:** At this point I would move to dismiss. They haven't established that the burglary was to a residence.

**Transcript #7, Page 2**

**THE COURT:** The bailiff has handed me a statement of defendant here, but I'd like you to verbalize for me, Mr. Lauritzen, if you will, what your arrangements are, please.

**MR. LAURITZEN:** Your Honor, regarding, and I don't have the case numbers, the state does, the pending charges, the state is going to dismiss some of them. They're going to amend one of them. The one they're going to amend now alleges a second degree felony. It will be amended to a third degree felony.

With regard to that, the defendant is reserving the issue on appeal as to whether or not it should be sentenced as a class A misdemeanor because of the interaction with the automobile burglary statute. That appeal would come to naught, of course, and wouldn't be filed in if the court decides ultimately to sentence it as a class A misdemeanor.

For that purpose, this is a Sari plea, which I believe is the right term. It is a plea reserving the right to appeal that sole issue, which is how the matter will be handled on sentencing. The defendant realizes he could be charged and tried on either auto burglary or burglary of a dwelling, but he contends in either case the sentencing would have to proceed on the lesser, which would be the auto burglary statute. That's his understanding. He's willing to press that matter to the Court of Appeals if necessary.

The state has agreed that the court should, in this case,

felony is that the owners of these camp trailers were located in Pole Canyon, which is immediately west of Randolph. They had been elk hunting and left their trailers locked and had some personal property in the trailers. When they came back for the deer hunt, which was approximately seven days later, they found the windows broken, locks broken, and the doors open on each of the two trailers. They then provided the sheriff's office with a list of property missing. And the sheriff later found the missing property with the aid of a search warrant and with the aid of, actually, the defendant's mother. A substantial amount of the property taken from the trailers was returned to the owners, and identified by the owners. The defendant also admitted burglarizing these trailers.

**THE COURT:** Mr. Webb, you heard the facts related to us by the prosecutor, Mr. Preston. Are you pleading guilty to the two counts because you committed them as he described them?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** The court will receive the guilty pleas, finding the same to be given freely and voluntarily. In so doing I will sign the order of statement of defendant and incorporate that into the record.

Mr. Preston, I note in observing this that you haven't signed the order, or signed the statement of defendant. If

Transcript #9, Page 5,6 and 7

companion and, two, develop a new group of companions. I think with those two things in mind -- I'm not going to go through the old saw of blaming things on his associations. I think he was as much as anyone throughout this thing to blame. He's been a real difficulty for law enforcement and for his parents. But I see some light at the end of the tunnel now and I appreciate the court taking that into consideration.

**THE COURT:** Thank you. Input from the state?

**MR. PRESTON:** Your Honor, I have in front of me an Adult Probation and Parole report. We get these reports as a result of a request by you to them for a report. They put a lot of time and effort into these reports. I've had occasion to read the report. I can't see that any judgment that I have in this case should do anything but to say that I concur with the recommendations in the report.

**THE COURT:** Very well. It will be ordered on the burglary, the third degree felony charge, that the defendant serve not more than five years in the Utah State Penitentiary. That will be stayed and the defendant will be placed on probation with Adult Parole and Probation under the following terms and conditions. He's to serve six months in the [illegible] County Jail. He may receive credit for the 49 days [illegible] He's to serve 60 days and then [illegible] work release at that point in time.

[redacted]s to pay a fine in the amount of $800. Pay restitution in the amount of $1,065 together with interest. [redacted] He's to complete a substance abuse evaluation and enroll in and complete recommended counseling, which shall include a minimum of two substance abuse counseling contacts per week. He's to complete a theft halt course as approved by his probation officer.

He's to have a no alcohol clause. Mr. Webb, that means you can't consume any alcohol nor be where others are consuming. No bars, taverns or even private parties. He's to have no association with known criminals or criminal types.

He's to be profitably engaged at all times. That means either in school or working full time or a combination thereof. All the other standard terms and conditions of probation will be in effect, including waiver of search and seizure.

In case ending 066, burglary of a vehicle, a class B misdemeanor, the defendant shall serve six months in the Ric County jail. That's to be consecutive to the above. However, the jail sentence will be stayed and he'll be place on probation as set forth previously. He's to pay a fine in the amount of $800 in that case.

Counsel, do you want to handle that third matter now? Quite frankly, I would give him a concurrent sentence and

impose a fine in that case.

**MR. LAURITZEN:** I would suggest he go ahead and plead guilty to it. I think we're prepared to enter a plea of guilty. I've thought through it and can't think of any defenses he might put up. Because it will be concurrent, I suggest that is probably the best way. Do you agree?

**THE DEFENDANT:** Yes.

**THE COURT:** Mr. Webb, I previously gave you your rights when you entered a guilty plea to the other two charges, plus you were sitting here this morning when I explained the rights to the defendant which Mr. Orifici represented. You understand that you have those same rights?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** You understand that if you enter a guilty plea here today you give up or waive those rights?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** You also understand that the maximum penalty in this case could be six months in the jail and a fine of up to a thousand dollars plus an 85 percent surcharge?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** Based on that is it your desire at this time to enter a guilty plea to the charge of unlawful [illegible] consumption of alcohol by a minor, a class B [illegible] alleged to have occurred August 12th, 2006?

**Transcript #6, Page 1**

IN THE FIRST JUDICIAL DISTRICT COURT

RICH COUNTY, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH, Plaintiff, | |
| vs. | Case No. 051100067 |
| | Transcript of Audio Tape. |
| JACOB A. WEBB, Defendant. | |

**Transcript of Pretrial Conference Hearing.**

Honorable Clint S. Judkins presiding.

First District Court Courthouse

Randolph, Utah

July 11, 2006

* * *

APPEARANCES:

For the Plaintiff: GEORGE W. PRESTON
County Attorney

For the Defendant: A. W. LAURITZEN
Attorney at Law

RODNEY M. FELSHAW
Registered Professional Reporter
First District Court
P. O. Box 873
Brigham City, UT 84302-0873

**Transcript #6, Page 5**

counselor.

**MR. LAURITZEN:** I don't care what it's for.

**THE COURT:** Okay. It's coming back to me now.

**MR. PRESTON:** In addition to that there is an auto burglary charge here that we shouldn't be confusing with the burglary.

**THE COURT:** Right. Now I recall the circumstances.

**MR. PRESTON:** Have I phrased that accurately?

**THE COURT:** To aid and assist you in negotiations, the court would rule that the trailer would comply with a habitable dwelling, so it would qualify under the burglary statute. Now, does that aid and assist you in your negotiations at all?

**MR. LAURITZEN:** No, it doesn't. Well, we'll never settle it on that basis. We'll have to have a trial.

**THE COURT:** You've heard my inclination. If that helps you out, fine.

**MR. PRESTON:** I have no objection to combining all four cases together and have a jury trial. That's fine with me.

**THE COURT:** Do you want me to set it for a jury trial or for a pretrial settlement conference in view of my inclination of ruling?

**MR. LAURITZEN:** We'll enter a plea of not guilty to the new charge. Let's set at least one for jury trial.

**Transcript #4, Pages 4-17**

**THE COURT:** Call your first witness.

**MR. PRESTON:** Call Mark Lee.

**MARK LEE,**

being first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

**BY MR. PRESTON:**

**Q.** State your name.

**A.** Mark Lee.

**Q.** And your address?

**A.** Woodruff, Utah.

**Q.** Occupation?

**A.** Deputy sheriff, Rich County.

**Q.** And how long have you been employed in that?

**A.** Fifteen years.

**Q.** Are you acquainted with the defendant in this case?

**A.** I am.

**Q.** Did you have occasion to receive a report of a burglary involving this defendant?

**A.** I did.

**Q.** And what date did you receive that report?

**A.** I believe it was around the 22nd of October, 2005.

**Q.** And who did the report come from?

**A.** It came from -- if I may refer to my notes because I don't remember the name. (Pause.) The complainants were

Linda Himes and her husband Buddy.

**Q.** And where are they from?

**A.** They are from, I believe, the Wasatch Front area.

**Q.** Did they file a report with the Rich County sheriff's office?

**A.** They did.

**Q.** And did you receive that report?

**A.** Yes.

**Q.** And what was reported to you at that time?

**A.** It was reported that two camping trailers tnat they had parked up Pole Canyon in Rich County had been broken into and items had been taken from them.

**Q.** As a result of that report what did you do?

**A.** I prepared a list based on their characterization of what was missing and itemized it and filed the report. And also broadcast an attempt to locate for the property.

**Q.** And how did you come to suspect the defendant of being involved in this particular offense?

**A.** It was while assisting in the investigation of another complaint based out of Wyoming.

**Q.** And what happened in the investigation of the Wyoming complaint?

**A.** In the process of assisting in that investigation, I concluded that it seemed like we had enough to prepare an affidavit for a search warrant, in which the defendant was a

suspect in that case also.

**Q.** And was a search warrant prepared in the Wyoming case?

**A.** It was.

**Q.** Was it executed?

**A.** Yes.

**Q.** And at the time of the execution of the search warrant -- pardon me. Where did you execute the search warrant?

**A.** We executed the search warrant on, I believe, two residences and one vehicle.

**Q.** And residence number one, what residence was that?

**A.** It was the residence of a juvenile that lives in Randolph.

**Q.** And residence number two?

**A.** The residence of the defendant and his parents.

**Q.** And the vehicle that was searched?

**A.** A vehicle that the defendant drove.

**Q.** As a result of the execution of these search warrants, did you have occasion to locate any of the property that had been described by these individuals from the trailers in Pole Canyon?

**A.** I believe so.

**Q.** And would you describe to the court what occurred at that time?

**A.** Yes. The property previously described by the complainants in the Pole Canyon case had included a hooded

sweat shirt that said ABC Roofing Supplies on it. That seemed to be somewhat unique to me. And there was some other property that was a little less easy to define. But also a blanket with a deer design on it, a deer print. And the blanket with the deer print, there was a blanket with a deer print and a hooded sweat shirt with ABC Roofing Supplies in the vehicle upon which we executed, in addition to some other property.

**Q.** And where were these located?

**A.** I believe in the trunk of the vehicle and in the back seat of the vehicle. This warrant was executed -- I'm sorry.

**Q.** Can you give me a date?

**A.** Yes.

**Q.** I've got 10/26 of 2005. Does that sound about right?

**A.** That sounds about right.

**Q.** All right. And as a result of locating these items, were there also other items located there?

**A.** There were.

**Q.** And can you identify those items as being similar to the described items?

**A.** Yes.

**Q.** And what were they?

**A.** Ammunition, a gun cleaning kit.

**Q.** As a result of the execution of this search warrant, did you have occasion to speak with the defendant?

**A.** Yes.

**Q.** And when did that conversation take place?

**A.** It occurred within the same hour as the servicing of the search warrant.

**Q.** And that would be on the 26th?

**A.** Yes.

**Q.** Who was present at the time of the conversation?

**A.** Agent Bartchi from the Cache/Rich task force, myself, and the defendant.

**Q.** Let me digress just a little bit. When you went up to the trailers in Pole Canyon, did you make any observations concerning entry into those trailers?

**A.** I did.

**Q.** And what did you observe?

**A.** It appeared that entry had been forced. There was violence to the door.

**Q.** Describe that if you will, please?

**A.** It appeared that they had been pried open.

**Q.** On both trailers or one trailer or what?

**A.** Both trailers.

**Q.** And was there any indication of wheel marks, tire marks, anything that would link those pry marks to the defendant?

**A.** No.

**Q.** So after execution of the search warrant you indicate that you had a conversation with the defendant?

**A.** Yes.

**Q.** And those present were?

**A.** Agent Bartchi, myself and the defendant.

**Q.** And at the time of the execution of the search warrant I believe one of the defendant's parents was present?

**A.** I don't recall whether or not a parent was present during the interview or not, but she was present when we executed the warrant, yes.

**Q.** All right. Now, then, would you describe what you said and what the defendant said during the conversation? Well, first of all, was he given a warning relative to his constitutional rights?

**A.** He was.

**Q.** Did you read that or did you cite it verbatim?

**A.** I read it.

**Q.** And having read him his rights, did he indicate whether or not he would like to speak to you?

**A.** Yes.

**Q.** And what did he say?

**A.** He said he would speak with us.

**Q.** And at that time tell me what he said and what you said?

**A.** He was remorseful and described that he had been up in the Pole Canyon area and had been involved with some other person, who he didn't wish to name at that time, in taking property from two campers that substantially matched the

description of the campers which I had taken a look at. And the property that he'd taken from those campers was in fact the property that I had seized as a result of the search warrant because it substantially matched the description of the property taken from those trailers.

**Q.** Did he ever indicate the identification of the other individual that what was with him?

**A.** I believe he did later on in a subsequent interview.

**Q.** And how long did the interview last?

**A.** The first one I think lasted about ten minutes. It was at his parents' house.

**Q.** And did you have a subsequent interview?

**A.** Yes, we did.

**Q.** And where did that take place?

**A.** At the sheriff's office.

**Q.** And who was present at the time of that interview?

**A.** Agent Bartchi and myself. And there was a lot of activity. I think there were a couple of other officers that came and went.

**Q.** And can you give me a date?

**A.** It was the same date.

**Q.** And was the defendant readvised of his constitutional rights?

**A.** I don't know. I don't recall whether he was readvised.

**Q.** But the two conversations were the same day?

**A.** They were the same day.

**Q.** And what's the time element in between the two?

**A.** Probably about half an hour, 45 minutes.

**Q.** What was said by you and what was said by him?

**A.** Essentially the same thing. He was attempting to be compliant and fix what he'd done.

**Q.** Did he ask for this conversation or did you ask for this conversation?

**A.** I think another officer asked for the conversation.

**Q.** Other than the sheriff's officer?

**A.** Yes. It was a law enforcement officer from Cache County.

**Q.** Okay. Anything said in that subsequent conversation that altered or changed the confession that he gave in the initial conversation?

**A.** No.

**MR. PRESTON:** You may cross.

**CROSS-EXAMINATION**

**BY MR. LAURITZEN:**

**Q.** Did you read the Miranda rights at the first interview from a card or something?

**A.** Yes.

**Q.** Do you have that card with you?

**A.** I do not.

**MR. LAURITZEN:** That's all.

**THE COURT:** Anything further, counsel?

**MR. PRESTON:** Just a minute, please.

(Pause in the proceedings.)

**REDIRECT EXAMINATION**

**BY MR. PRESTON:**

**Q.** How did you determine the value of the property as it relates to the theft?

**A.** Umm, a combination of characterization from the victims and my own reasonable best guess.

**Q.** In your opinion what was the -- in your opinion did the property exceed $300 but was less than $1,000?

**MR. LAURITZEN:** Objection. He's not qualified for that.

**THE COURT:** Overruled. He may give his opinion.

**THE WITNESS:** In my opinion, yes, it was in excess of 300 but less than a thousand.

**MR. PRESTON:** No further questions.

**THE COURT:** Mr. Lauritzen?

**MR. LAURITZEN:** Nothing.

**THE COURT:** Thank you. You may step down. Any other witnesses?

**MR. PRESTON:** No.

**THE COURT:** Mr. Lauritzen?

**MR. LAURITZEN:** At this point I would move to dismiss. They haven't established that the burglary was to a residence.

**MR. PRESTON:** It isn't charged as a residence, it's charged as a building.

**MR. LAURITZEN:** Or to a building as far as that goes. It doesn't classify as a felony burglary.

**THE COURT:** Give me your argument for that, counsel. The testimony that the court heard was to a trailer and to a camper.

**MR. LAURITZEN:** And they are motor vehicles. Under state law they are both motor vehicles, what was described.

**MR. PRESTON:** A motor vehicle is a motor vehicle. A trailer is a trailer. The two are separate and distinct items.

**MR. LAURITZEN:** I don't know why I have to put license plates on my trailers and register them and put insurance on them if that's the case.

**THE COURT:** Your motion to dismiss is denied. You can raise that issue later by way of a written motion. The court will consider it then.

**MR. PRESTON:** I'd like to see that motion.

**THE COURT:** Closing arguments?

**MR. PRESTON:** Submit it.

**MR. LAURITZEN:** As will I.

**THE COURT:** The court finds that the state has shown that there is probable cause to believe that the offense as described in the information were committed and that the

defendant committed the same.

This is a probable cause hearing, Mr. Lauritzen. That's on of the bases for denying your motion. You may have a basis for that, but it would be more appropriate to bring that by way of a written motion, either at or before the time for arraignment.

Let's continue the matter for arraignment. I'll designate that as a pretrial settlement conference. We'll continue the other two cases to the same time. That is, follow this case with the other two misdemeanor cases.

What about May 23rd? Mr. Lauritzen, are you planning to be here that day?

**MR. LAURITZEN:** I'm not, but I don't see why I couldn't come over. I'm open that day.

**THE COURT:** Okay. Becky, do we have a trial that day?

**THE CLERK:** We're fine.

**THE COURT:** Okay. May 23rd for all three cases. Arraignment in case ending in 067 and also pretrial in the other two cases as well.

**MR. LAURITZEN:** Your Honor, there's probably one other matter we ought to address with Mr. Webb. The court may recall, I was appointed to represent him in this matter quite some time ago. Since then he's obtained employment. Further, the court temporarily appointed me on the two cases

which there's been no arraignment on yet. Again, he's obtained employment and he maybe ought to recertify as far as his right to indigent counsel. The point being, even though I've prelimed this one, is whether he's still entitled to legal services. The other point being whether these other matters which are yet to come before the court --

**THE COURT:** If that appointment should be extended to the other two?

**MR. LAURITZEN:** Yes.

**THE COURT:** Very well. Mr. Webb, I want you to complete another affidavit based on the representations of Mr. Lauritzen. Do that now and do it completely. I want to know your present situation, where you are working now and how much money you're making at this point in time. My clerk will provide with you that affidavit. Do that and then I'll call you back up after you've had an opportunity to complete that. And Mr. Preston apparently likes to scrutinize those more closely now.

**MR. PRESTON:** I intend to.

**THE COURT:** I'll give you an opportunity to cross-examine him if you wish.

**MR. PRESTON:** I'd like to at least compare the two documents.

**THE COURT:** Very well.

(Other cases heard.)

**THE COURT:** Let's go back to the Webb case. Mr. Webb, after you've just seen what happened to Ms. Weston, I'm sure you will make certain representations here to the court in regards to your affidavit. You tell me you're employed by W.B.L. Construction?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** You've been there two weeks?

**THE DEFENDANT:** Approximately.

**THE COURT:** You make ten dollars per hour?

**THE DEFENDANT:** Yes.

**THE COURT:** Is that a 40 hour week?

**THE DEFENDANT:** Sometimes a little over. Around 40, though.

**THE COURT:** So you're going to be making somewhere around 16 to 18 hundred a month?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** Now, with take home, you'll be down somewhere about 1400, is that what you anticipate?

**THE DEFENDANT:** Approximately.

**THE COURT:** You don't have any children you're supporting?

**THE DEFENDANT:** No, sir.

**THE COURT:** Mr. Preston, I'll allow you to examine the affidavit and, if you so desire, ask questions under oath of the applicant.

**MR. PRESTON:** Do you have a copy of the prior affidavit?

**THE COURT:** I may have one here in the file, counsel. Let me see.

(Pause in the proceedings.)

**MR. PRESTON:** I have no questions.

**THE COURT:** Very well. The court finds that the defendant is indigent and will appoint Mr. Lauritzen to represent him.

One thing I did forget to do. Mr. Webb, stand up and raise your right hand. Do you swear that the information contained in this affidavit is true and accurate to the best of your information and belief, so help you God?

**THE DEFENDANT:** Yes.

**THE COURT:** Very well. All right. We set up the schedule as relates to Mr. Webb earlier. The court will handle it in that fashion.

(Hearing concluded.)